

No. 14400

United States
Court of Appeals
for the Ninth Circuit

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLE-
SALE, a Corporation,

Appellants,

vs.

RALPH W. HELD,

Appellee.

Transcript of Record

Appeal from the United States District Court for the
District of Arizona

FILED

AUG 31 1954

PAUL P. O'BRIEN

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court for the
District of Arizona
No. Civ.-1798 Phx.

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation, and SOUTH-
WEST CO-OPERATIVE WHOLESALE, a
Corporation,

Defendants.

COMPLAINT

Comes Now the plaintiff, Ralph W. Held, and
for his complaint against the defendants, alleges:

I.

The Plaintiff, Ralph W. Held, is a citizen of the
State of Iowa. The defendant United Producers
and Consumers Co-Operative is a corporation incor-
porated under the laws of the State of Arizona,
and the defendant Southwest Co-Operative Whole-
sale is a corporation incorporated under the laws
of the State of Arizona. The matter in controversy
exceeds, exclusive of interest and costs, the sum of
Three Thousand (\$3,000.00) Dollars.

II.

That on or about the 22nd day of March, 1952,
plaintiff entered into a contract with the defendants
in writing according to the terms of which the de-
fendants agreed to employ the plaintiff as manager
for a term of three (3) years beginning on the 1st

day of April, 1952, a copy of which contract is attached hereto marked "Exhibit A," and by this reference made a part hereof.

III.

That on or about the 1st day of April, 1952, pursuant to the terms of said contract of employment, the plaintiff entered upon the service of the defendants under said contract and has ever since been ready, willing and able to perform all of the obligations on his part to be performed as provided in said contract.

IV.

That on or about the 20th day of June, 1952, the defendants and each of them, wrongfully discharged the plaintiff and cancelled the contract and notified the plaintiff that his services were terminated.

V.

That as a result of the wrongful termination of said contract, the plaintiff has been damaged in the sum of Twenty-five Thousand, Four Hundred Ten and 50/100 (\$25,410.50) Dollars.

Wherefore, plaintiff prays judgment against the defendants and each of them, in the sum of Twenty-five Thousand, Four Hundred Ten and 50/100 (\$25,410.50) Dollars, together with his costs herein incurred and expended.

JENNINGS, STROUSS,
SALMON & TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

EXHIBIT A

Manager's Agreement

This Agreement, made and entered into by and between Ralph W. Held, hereinafter called Manager, and Southwest Co-Operative Wholesale and/or United Producers and Consumers Co-Operative hereinafter called Company, Witnesseth:

In consideration of the mutual obligation of the parties hereto, It Is Agreed as Follows:

1. That Company hereby employs Manager in the capacity of General Manager of its business for a period of three years beginning April 1st, 1952, and Manager agrees to give his exclusive time to the management and promotion of the affairs of the company.

2. That Manager shall have the right to employ and discharge all persons needed to carry on the affairs of the business; shall supervise all personnel under independent contract with Company for the distribution of its products in accordance with the provisions of such contract with such person, and shall immediately report to the executive officers of the Board of Directors any misconduct or failure of duty of Company's employees, or of any salesman.

3. That Manager shall furnish a corporate surety bond to Company indemnifying Company against loss of any moneys, merchandise, or any properties, occasioned by his default of duty, such bond to be in an amount designated by the Board of Directors

of Company. The premium for such corporate surety bond shall be paid by Company.

4. As fixed compensation for Manager's services hereunder, Company agrees to pay the Manager as fixed compensation for first year's period a salary of \$10,000.00.

It is understood and agreed that Manager's moving expense from Des Moines, Iowa, to Phoenix, Arizona, shall be paid by the Company, but expense shall in no event exceed \$500.00.

Compensation for the second and third years of this three year agreement shall be at the rate of \$10,000.00 per annum plus two (2) per cent of the net income of Company.

It is further understood and agree that at the expiration of this three-year agreement, it may be renewed for another three-year period by the mutual consent of the parties hereto at the same rate as specified for the final two years of this agreement.

It Witness Whereof the parties have placed their hands to duplicates hereof this 22nd day of March, A.D. 1952.

Company:

SOUTHWEST CO-OPERATIVE WHOLESALE
and/or UNITED PRODUCERS & CONSUMERS
CO-OPERATIVE,

By /s/ W.L. SMITH,
President.

Manager:

/s/ RALPH W. HELD.

[Endorsed]: Filed October 10, 1952.

[Title of District Court and Cause.]

ANSWER

The defendants in the above-entitled cause for their answer to the plaintiff's complaint therein, admit, deny and allege as follows:

I.

They admit the allegations of paragraph numbered I of said complaint.

II.

Answering paragraph II of said complaint, the defendants deny that they ever entered into the contract in writing therein described and referred to and deny the execution by the defendants, or either of them, or by the authority of either of them, of the so-called "Manager's Agreement," a copy of which is attached to said complaint as Exhibit A. In this behalf the defendants admit that, under the circumstances hereinafter set forth, one W. L. Smith who was then president of the Board of Directors of each of the defendants, signed his name to said "Manager's Agreement," and that thereafter, to wit, on or about March 22, 1952, the plaintiff signed the same; but the defendants allege that said purported agreement is, and at the time of the attempted making thereof was, unauthorized, illegal, contrary to public policy, and void, because of the following facts, which the defendants allege to be the facts, to wit:

(a) That the Articles of Incorporation, together

with the bylaws of each of the defendants, provide, as the plaintiff at the time when he attempted to make said contract well knew, that the affairs of the corporation were to be conducted by a board of directors and that the board of directors had the power to appoint and remove at pleasure all officers, agents and employees of the company, and to appoint a manager who was to hold office at the pleasure of said board; but in violation of said provisions said manager's agreement purports to employ the plaintiff for the full period of at least three years, beginning April 1, 1952, and to give him the right and authority to employ and discharge all persons needed to carry on the business of the defendants.

(b) That at the time of the attempted making of said manager's agreement, the board of directors of the defendant United Producers and Consumers Co-Operative consisted of seven members, each of whom was holding office for a three-year term, and the terms of office of three of them were to expire in October, 1952, the terms of office of two of them were to expire in October, 1953, and the terms of office of the remaining two were to expire in October, 1954, and the board of directors of the defendant Southwest Co-Operative Wholesale consisted of ten members, each of whom was holding office for a three-year term, and the terms of office of three of them were to expire in October, 1952; the terms of office of another three of them were to expire in October, 1953, and the terms of office of

the remaining four of them were to expire in October, 1954; so that the said purported manager's agreement attempted to turn over to the exclusive control of the plaintiff the operation and management of each of the defendants for periods long after the expiration of the terms of office of the directors then in office.

(c) That no action was ever taken by the board of directors of either of the defendants in relation to employment of the plaintiff as manager, other than the adoption of a resolution by the board of directors of each defendant on March 6, 1952, reading as follows: "that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out terms of employment," the Mr. Smith referred to in said resolution being Mr. W. L. Smith, then president of each defendant, the Mr. Walmsley therein referred to being Mr. Lewis G. Walmsley, the auditor of the defendants, and the Mr. Held therein referred to being the plaintiff Ralph W. Held; but notwithstanding the premises the said purported manager's agreement was never submitted to or approved by the defendants' said auditor, nor was said auditor ever consulted concerning, nor did he ever agree to, the provisions of said agreement attempting to give the plaintiff power to employ and discharge all persons needed to carry on the affairs of the business, or attempting to give the plaintiff such entire charge of the defendants' affairs for the full period of at least three years regardless of his ability, or efficiency, or

whether his services should meet with the approval of the board of directors of the respective defendants. In this behalf the defendants allege that said form of manager's agreement had been prepared by the plaintiff, and on March 6, 1952, was presented to the defendants' said president, W. L. Smith, who signed the same without presenting it to said auditor or getting his assistance in working out its terms, with the understanding between the plaintiff and said W. L. Smith that the plaintiff would take both copies of said form of agreement back to his home in the State of Iowa and would thereafter, within fifteen days, execute the same and return it to said Smith, if the plaintiff decided that he would accept the contemplated employment. The defendants allege on information and belief that it was the intention and understanding of said W. L. Smith, at the time when he so signed and placed in the possession of the plaintiff said form of agreement, that in the event the plaintiff should thereafter sign and return a copy thereof, then he would consult with the defendants' said auditor and determine whether the terms of said manager's agreement were satisfactory and valid. The defendants allege, however, that their said president, W. L. Smith, died on the morning of March 25, 1952, and that said manager's agreement signed by the plaintiff did not come to him during his lifetime, but came by mail to his residence on March 25, 1952, after the hour of his death, and never has been approved by the defendants'

said auditor or by either of their boards of directors.

III.

Answering paragraph III of said complaint, the defendants admit that on or about the first day of April, 1952, the plaintiff entered upon the service of the defendant in claimed compliance with the aforesaid purported manager's agreement but deny that he was ever ready, willing or able to perform the services called for in said contract.

IV.

Answering paragraph IV of said complaint, the defendants admit that on or about the 20th day of June, 1952, they, in their resolution hereinafter mentioned, declared the purported employment of the plaintiff at an end, but deny that at any time they wrongfully discharged the plaintiff or wrongfully cancelled his contract. In this behalf the defendants allege that upon the death of said president, W. L. Smith, one D. O. Essley was elected as president of each defendant, and that upon said new president discovering the terms of said so-called manager's agreement, he notified the plaintiff, on or about May 27, 1952, that the legality of the plaintiff's employment was questioned, and thereupon, after discussions and negotiations between members of said board of directors and the plaintiff, the boards of directors of the defendants each duly adopted and transmitted to the plaintiff the aforementioned resolution, which resolution stated that in view of the fact that the board mem-

bers were of the opinion that the plaintiff was never legally employed and the illegality of his employment only recently had been discovered by the board of directors, and in view of the fact that the plaintiff had never fulfilled the terms of his contract, therefore, his purported employment by the defendants was declared at an end.

V.

Answering paragraph numbered V of the complaint, the defendants deny that as a result of their termination of the plaintiff's claimed contract of employment, or by any wrongful act or conduct on the part of the defendants, or either of them, the plaintiff has been damaged in the sum of \$25,410.50 or in any other sum whatsoever.

VI.

Further answering the plaintiff's complaint, the defendants allege that, even if it should be determined that the so-called manager's agreement sued upon was, or ever became, a valid agreement between the parties thereto, even so, the plaintiff, during the period of his pretended performance of his part of said contract, so far breached and failed to live up to said contract as to justify the defendants in declaring said purported contract to be terminated. In this behalf the defendants allege the facts to be as follows:

That during the time when the plaintiff was assuming and purporting to act as manager of the defendant he did not have nor exercise the capacity

or ability to properly serve as such manager; he did not have nor exercise the capacity or ability to lead or direct the employees of the defendants or recognize or utilize the ability of such employees to render efficient services; he did not remain on the job at his office or at the defendants' place of business a sufficient length of time each day to properly manage or direct the business or employees of the defendants; that although there were some twelve department heads and about 125 other employees in the service of the defendants, the plaintiff did not confer with them or direct them or hold needed meetings of department heads or staff members or other employees; that contrary to the express terms of said claimed manager's agreement, the plaintiff violated his duty immediately to report to the executive officers of the boards of directors of the defendants certain misconduct and failure of duty on the part of a sales manager of the defendants, upon such misconduct coming to the attention of the plaintiff, which misconduct and failure of duty consisted of said sales manager wrongfully seeking and endeavoring to exact from a number of salesmen working under him a percentage of their commissions; and that by the plaintiff's aforesaid breaches of his claimed contract and failure to properly perform the duties of a general manager, he was greatly injuring the morale of a large number of faithful employees of the defendants, and continuance of the regime he had assumed as manager would have been highly injurious to the business of the defendants.

The defendants further allege that during the entire time when the plaintiff was so assuming to act as manager of the defendants, he drew from the defendants and caused them to pay him, for his claimed services, the total sum of \$2,275.64; and that the defendants have fully paid, and in fact overpaid, the plaintiff for any and all services rendered them, or either of them, by him.

Wherefore, the defendants pray the judgment of the court that the plaintiff take nothing by his complaint and that the defendants have their taxable costs herein incurred.

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

State of Arizona,
County of Maricopa—ss.

D. O. Essley, being first duly sworn, on his oath deposes and says:

That he is the President of the Board of Directors of both the defendant United Producers & Consumers Co-Operative and the Southwest Co-Operative Wholesale, and makes this affidavit for and on behalf of said two corporations; that this affiant has read the plaintiff's complaint in the above-entitled cause and the defendants' foregoing answer and knows the contents of said documents: that the allegations of the plaintiff's complaint

which are in the foregoing answer denied are untrue, except as to such thereof as are denied on information and belief, and that as to those, this affiant believes them to be untrue; and that the allegations of the foregoing answer are true of this affiant's own knowledge, except as to such thereof as are made on information and belief, and that as to those, he believes them to be true.

/s/ D. O. ESSLEY.

Subscribed and sworn to before me this 3rd day of November, 1952.

[Seal] /s/ LEORA SCHUCK,
Notary Public.

My commission expires Jan. 2, 1955.

Affidavit of mailing attached.

[Endorsed]: Filed November 4, 1952.

[Title of District Court and Cause.]

ORDER

It Is Ordered that judgment be entered in favor of the plaintiff, and against the defendants, in the sum of \$22,246.68.

Dated: August 25, 1953.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed August 26, 1953.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT

The above-entitled action came on regularly for trial before the Court without a jury, the plaintiff appearing in person and by his attorney, Mr. O. M. Trask, of the firm of Jennings, Strouss, Salmon & Trask, and the defendants appearing by their duly authorized agents, and by their attorney, Mr. Lynn M. Laney, of the firm of Laney & Laney, and testimony having been offered and briefs filed by both parties, the Court, having been fully advised in the premises, now makes and files its findings of fact as follows:

Findings of Fact

I.

That the plaintiff, Ralph W. Held, is a citizen of the State of Iowa and defendants, United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, are both corporations organized and incorporated under the laws of the State of Arizona and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That on or about March 22, 1952, the plaintiff and defendants entered into a written contract according to the terms of which the defendants agreed to employ the plaintiff as manager for a period of three (3) years beginning on the 1st day

of April, 1952, at an annual salary of Ten Thousand (\$10,000.00) Dollars per year, plus two (2%) per cent of the net income of the corporations for the second and third years of the agreement.

III.

That said contract was executed on behalf of the defendants by W. L. Smith, President of each of the defendants, who had been expressly empowered by the Boards of Directors of each of the defendant corporations to negotiate and enter into said contract on behalf of the said defendant corporations.

IV.

That the term of the contract was a reasonable term in view of the terms of office of the several boards of directors and the established practice of continuing said directors in office; that the bylaws of each of the defendant corporations provided for the amendment of said bylaws by the Boards of Directors of the defendant corporations; and that the action of the respective Boards of Directors in entering into the contract amounted to an amendment of said bylaws in any respect necessary to enable each of said corporations to enter into said contract.

V.

Under the evidence the approval of Lewis G. Walmsley was not required to authorize or validate said contract but both Walmsley and the Boards of Directors of the two corporations at all times knew, or were charged with knowledge, of the existence

of said contract and failed to object to the terms of said contract or disapprove it. The plaintiff, Ralph W. Held, was not notified formally or charged with knowledge of any requirement, even if it existed, that Lewis G. Walmsley was supposed to approve the terms of said contract.

VI.

At all times W. L. Smith, President of each of the defendant corporations, had been clothed with the apparent authority by the Boards of Directors of the two defendant corporations to negotiate and execute the contract with the plaintiff. The said President, W. L. Smith, at all times during the negotiation of the contract and at the time of its execution by both parties, had implied authority to bind each of the defendant corporations to the terms of said contract.

VII.

That on or about April 1, 1952, the plaintiff entered upon the performance of his duties as manager pursuant to the terms of the contract, and at all times thereafter complied with all of the terms thereof up to and including the date upon which the contract was terminated by the action of the two defendant corporations; that the action of the plaintiff in entering upon his duties and in performance of said duties as required by the contract was at all times with the full knowledge of the two corporations and the members of the Boards of Directors of the said corporations.

VIII.

That on or about June 20, 1952, the defendant corporations and each of them, discharged the plaintiff and cancelled his contract and notified the plaintiff that his services were terminated; that said action on the part of each of the defendant corporations was wrongful and without justification.

IX.

That the plaintiff sustained damages proximately resulting from the termination of said contract in the total sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

[Title of District Court and Cause.]

PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT ON BEHALF OF THE PLAINTIFF

Conclusions of Law

From the foregoing findings the Court concludes:

I.

That the contract between plaintiff and the defendants dated March 22, 1952, was a legally valid and enforceable contract.

II.

That the plaintiff at all times prior to the wrongful termination of said contract satisfactorily performed the terms thereof.

III.

That said contract was terminated by the defendants wrongfully and without justification on or about June 20, 1952, which termination constituted an actionable breach of the contract by said defendants.

IV.

That the plaintiff is entitled to recover from the defendants for the breach of said contract the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

JUDGMENT

Wherefore, It Is Ordered by the Court that the plaintiff recover judgment against the defendants, and each of them, in the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars, together with plaintiff's costs in the sum of One Hundred Seventy-two and 78/100 (\$172.78) Dollars.

Dated this day of September, 1953.

.....,

United States District Judge.

Received September 4, 1953.

[Endorsed]: Filed September 4, 1953.

[Title of District Court and Cause.]

PROPOSED AMENDMENTS AND ADDITIONS
TO PLAINTIFF'S PROPOSED FINDINGS

Pursuant to Rule 21 of the Rules of Practice of the United States District Court for the District of Arizona, the defendants respectfully propose the following amendments and additions to the proposed Findings of Fact, Conclusions of Law and Judgment in the above-entitled cause, which were served on counsel for the defendants on September 4, 1953, to wit:

1. The defendants propose an amendment of Finding of Fact No. II by inserting after the words "defendants entered into," where they occur in the second line of said paragraph, the following: ", in the manner hereinafter set out,"; and by adding at the end of said paragraph the following: ", the said written contract being in words and figures as set out in Exhibit "A" attached to the plaintiff's complaint."

2. The defendants propose that Paragraph III of said Findings be amended so as to read as follows:

That said contract was executed on behalf of the defendants by W. L. Smith, president of each of the defendants, who together with the defendants' auditor, Lewis G. Walmsley, had been expressly authorized to employ the plaintiff by a resolution of each board of directors, worded as follows:

“Be It Resolved that Mr. Smith and Mr. Walmsley be authorized to employ Mr. Held as general manager and work out terms of employment.”

That said auditor Walmsley did not sign said contract of employment or agree thereto, or work out or help to formulate the terms of employment therein contained.

3. That Paragraph IV of said Findings be amended by adding thereto the following further findings, to wit:

That the provision of the bylaws of the United Producers & Consumer Co-Operative relative to amendment (Article XIV) at the time of making the contract, was as follows:

“These bylaws may be altered or amended at any annual or special meeting of the members called for that purpose. The written assent of a majority of the members shall be effectual to repeal or amend any bylaws or to adopt additional bylaws without any meeting. The bylaws may be amended, altered or repealed by the board of directors at any regular or special meeting.”

That the provision of the bylaws of the defendant Southwest Co-Operative Wholesale concerning amendment (Article VII) was as follows:

“These bylaws may be amended by the ma-

jority vote of the directors of the corporation at any meeting called for that purpose, except as limited in the Articles of Incorporation or by law.”

That the bylaws of United Producers and Consumers Co-Operative contained the following provisions in Article V under the heading “Powers of Directors”:

* * *

“Section 2. To appoint and remove, at pleasure, all officers, agents and employees of the Co-Operative, prescribe their duties, fix their compensation and require from them, if advisable, security for faithful service.

* * *

“Section 8. The Board of Directors may, in its discretion, appoint a manager who shall hold office at the pleasure of and upon terms and conditions fixed by the Board of Directors.”

That the bylaws of the Southwest Co-Operative Wholesale contained the following provisions:

“The Board of Directors shall have the following powers:

“2. To appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them, if deemed advisable, security for faithful service.

“3. To appoint a manager who shall hold office at the pleasure and upon the terms and conditions fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe.”

That at the time of the signing of said manager's agreement, the board of directors of United Producers & Consumers Co-Operative consisted of seven members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of two of them to expire in October, 1953, and the terms of office of the remaining two to expire in October, 1954; and the board of directors of Southwest Co-Operative Wholesale consisted of ten members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of another three of them to expire in October, 1953, and the terms of office of the remaining four to expire in October, 1954.

4. That the first sentence of Paragraph V of said Findings, being the first five and one-half lines thereof, be stricken out because not supported by the evidence; and that the last sentence of said paragraph be amended so as to read as follows:

The plaintiff Ralph W. Held was not notified formally of any requirement, if it existed, that Lewis G. Walmsley was supposed to approve the terms of said contract, but that the plaintiff was

present when the president of the defendants handed the aforementioned resolution for the employment of the plaintiff to the assistant secretary of the defendants, Pauline McInerney, for recording in the corporate minutes, and he had knowledge that W. L. Smith was acting as agent, and he relied solely on the representations of W. L. Smith as to his authority and made no investigation as to the actual authority of W. L. Smith.

5. The defendants propose that Paragraph VI of said Findings be amended by striking out the first sentence thereof, on the ground that the same is not sustained by the evidence. The defendants further propose that the second sentence of Paragraph VI be stricken out, on the ground that the same is not sustained by the evidence. In this behalf the defendants propose that the court make the following findings of fact, either in lieu of the matter so proposed to be stricken or at any rate at some place in the court's findings of fact, to wit:

That prior to the time when the agreement sued upon was formulated and signed the plaintiff received from defendants copies of the bylaws of the defendant United Producers & Consumers Co-Operative and the bylaws of the Southwest Co-Operative Wholesale, and he was familiar with the terms of said bylaws at the time when said contract was formulated and signed.

6. That the following additions to Paragraph

IX of said Findings be made at the end of said paragraph, to wit:

That the items comprising said total sum of damages as found by the court are as follows:

Fixed wage from defendants for three years	\$30,000.00	
2% of net margin for 2nd year (based on average for years 1951, 1952 & 1953)	6,196.66	
2% of net margin for 3rd year (on same basis)	6,196.66	
	<hr/>	
Total		\$42,393.32
Less amount received from the defendants	\$ 2,275.64	
Less amount received and to be received from present employment:		
First year	4,725.00	
Second year	8,100.00	
Third year	8,100.00	
	<hr/>	
Total		23,200.64
		<hr/>
Contract Damages		\$19,192.68
Special damages:		
Loss deposit on house which plaintiff purchased	\$ 2,100.00	
Expense of travel	454.00	
Moving expense	500.00	
	<hr/>	
	\$ 3,054.00	
		3,054.00
		<hr/>
Total Damages		\$22,246.68

By proposing the foregoing amendments and additions to the plaintiff's proposed findings of fact, the defendants do not intend to waive their right to

object and except, by motion for new trial or for modification of the judgment, to the court's findings and judgment as they may be finally settled herein.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Received September 9, 1953.

[Endorsed]: Filed September 9, 1953.

In the United States District Court for the
District of Arizona

No. Civ. 1798 Phx.

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS AND CONSUMERS CO-
OPERATIVE, a Corporation; SOUTHWEST
CO-OPERATIVE WHOLESALE, a Corpra-
tion,

Defendants.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND JUDGMENT

The above-entitled action came on regularly for trial before the Court without a jury, the plaintiff appearing in person and by his attorney, Mr. O. M.

Trask, of the firm of Jennings, Strouss, Salmon & Trask, and the defendants appearing by their duly authorized agents, and by their attorney, Mr. Lynn M. Laney, of the firm of Laney & Laney, and testimony having been offered and briefs filed by both parties, the Court, having been fully advised in the premises, now makes and files its findings of fact as follows:

Findings of Fact

I.

That the plaintiff, Ralph W. Held, is a citizen of the State of Iowa and defendants, United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, are both corporations organized and incorporated under the laws of the State of Arizona and the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand (\$3,000.00) Dollars.

II.

That on or about March 22, 1952, the plaintiff and defendants entered into, in the manner hereinafter set out, a written contract according to the terms of which the defendants agreed to employ the plaintiff as manager for a period of three (3) years beginning on the 1st day of April, 1952, at an annual salary of Ten Thousand (\$10,000.00) Dollars per year, plus two (2%) per cent of the net income of the corporations for the second and third years of the agreement, the said written contract being in words and figures as set out in Exhibit A attached to Plaintiff's complaint.

III.

That said contract was executed on behalf of the defendants by W. L. Smith, President of each of the defendants, who had been authorized by the Boards of Directors of each of the defendant corporations to negotiate and enter into said contract on behalf of the said defendant corporations.

IV.

That the term of the contract was a reasonable term in view of the terms of office of the several boards of directors and the established practice of continuing said directors in office; that the bylaws of each of the defendant corporations provided for the amendment of said bylaws by the Boards of Directors of the defendant corporations; and that the action of the respective Boards of Directors in entering into the contract amounted to an amendment of said bylaws in any respect necessary to enable each of said corporations to enter into said contract.

That at the time of the signing of said manager's agreement, the board of directors of United Producers & Consumers Co-Operative consisted of seven members, each holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of two of them to expire in October, 1953, and the terms of office of the remaining two to expire in October, 1954; and the board of directors of Southwest Co-Operative Wholesale consisted of ten members, each

holding office for a three-year term, with the terms of office of three of them to expire in October, 1952, the terms of office of another three of them to expire in October, 1953, and the terms of office of the remaining four to expire in October, 1954.

V.

Under the evidence the approval of Lewis G. Walmsley was not required to authorize or validate said contract but both Walmsley and the Boards of Directors of the two corporations at all times knew of the existence of said contract and failed to object to the terms of said contract or disapprove it. The plaintiff, Ralph W. Held, was not notified formally that Lewis G. Walmsley was supposed to approve the terms of said contract.

That prior to the time when the agreement sued upon was formulated and signed the plaintiff received from defendants copies of the bylaws of the defendant United Producers & Consumers Co-Operative Wholesale.

VI.

That on or about April 1, 1952, the plaintiff entered upon the performance of his duties as manager pursuant to the terms of the contract, and at all times thereafter complied with all of the terms thereof up to and including the date upon which the contract was terminated by the action of the two defendant corporations; that the action of the plaintiff in entering upon his duties and in performance of said duties as required by the contract was at all times with the full knowledge of the two cor-

porations and the members of the Boards of Directors of the said corporations.

VII.

That on or about June 20, 1952, the defendant corporations and each of them, discharged the plaintiff and cancelled his contract and notified the plaintiff that his services were terminated; that said action on the part of each of the defendant corporations was wrongful and without justification.

VIII.

That the plaintiff sustained damages proximately resulting from the termination of said contract in the total sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

That the items comprising said total sum of damages as found by the Court are as follows:

Fixed wage from defendants for three years	\$30,000.00	
2% of net margin for 2nd year (based on average for years 1951, 1952 & 1953)	6,196.66	
2% of net margin for 3rd year (on same basis)	6,196.66	
	<hr/>	
Total		\$42,393.32
Less amount received from the defendants	\$ 2,275.64	
Less amount received and to be received from present employment:		
First year	4,725.00	
Second year	8,100.00	
Third year	8,100.00	
	<hr/>	
Total		23,200.64
		<hr/>
Contract Damages		\$19,192.68

Special damages:

Loss deposit on house which plaintiff purchased	\$ 2,100.00	
Expense of travel	454.00	
Moving expense	500.00	
	<hr/>	
	\$ 3,054.00	3,054.00
		<hr/>
Total Damages		\$22,246.68

Conclusions of Law

From the foregoing findings the Court concludes:

I.

That the contract between plaintiff and the defendants dated March 22, 1952, was a legally valid and enforceable contract.

II.

That the plaintiff at all times prior to the wrongful termination of said contract satisfactorily performed the terms thereof.

III.

That said contract was terminated by the defendants wrongfully and without justification on or about June 20, 1952, which termination constituted an actionable breach of the contract by said defendants.

IV.

That plaintiff is entitled to recover from the defendants for the breach of said contract the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars.

Judgment

Wherefore, It is Ordered by the Court that the plaintiff recover judgment against the defendants, and each of them, in the sum of Twenty-two Thousand Two Hundred Forty-six and 68/100 (\$22,246.68) Dollars, together with plaintiff's costs in the sum of One Hundred Seventy-two and 78/100 (\$172.78) Dollars.

Dated this 6th day of October, 1953.

/s/ DAVE W. LING,

United States District Judge.

Receipt of copy acknowledged.

[Endorsed]: Filed October 6, 1953.

[Title of District Court and Cause.]

DEFENDANTS' MOTION FOR NEW TRIAL,
MOTION TO AMEND FINDINGS AND MO-
TION TO AMEND JUDGMENT

Motion for New Trial

The defendants move that the judgment entered herein be vacated and set aside and that a new trial be granted on the following grounds:

(1) That the judgment is contrary to law and not supported by the weight of the evidence or the evidence at all.

(2) That the court erred in finding as a fact

that the making of the manager's agreement sued upon, by W. L. Smith, president of each of the defendants, had been authorized by the boards of directors of the defendants, because said finding is not supported by the evidence.

(3) That the court erred in making its findings of fact to the effect that the term of the contract was reasonable though extending beyond the terms of office of the directors, because of the practice in the past of re-electing the directors, and to the effect that the conduct of the boards of directors amounted to an amendment of the bylaws in such manner as to permit the corporations to enter into the contract, because such findings are not supported by the evidence.

(4) That the court erred in finding as a fact that the approval of Lewis G. Walmsley, auditor of each defendant, was not required to authorize or validate the contract, and in finding that said Walmsley and the boards of directors "at all times knew of the existence of said contract and failed to object to the terms of said contract or disapprove of it," because such findings are not supported by the evidence.

(5) That the court erred in its finding that the action of each defendant corporation in discharging the plaintiff and cancelling his claimed contract was wrongful and without justification, because such finding is not supported by the evidence, in that there never was any validly authorized contract.

(6) That the court erred in finding as facts that the plaintiff was entitled, as items of damage, to \$6,196.66 as and for 2 per cent of the net margin for the second year of the term of the contract, to \$6,196.66 as and for 2 per cent of the net margin for the third year, to \$2,100.00 for loss of deposit on house which plaintiff purchased, and to \$545.00 for "expense of travel," on the ground that each and all of said findings are contrary to law and not supported by the evidence.

Motion to Amend Findings

In keeping with certain of the above-stated grounds for defendants' Motion for New Trial, the defendants move the court that the findings of fact made by the court be amended so as to eliminate therefrom the findings of fact alleged to be unsupported by the evidence in paragraphs 2, 3, 4, 5 and 6 of said Motion for New Trial.

The grounds of this motion are that said findings are contrary to and not supported by the evidence.

Motion to Amend Judgment

In the event the court shall deny the foregoing Motion for New Trial, then, without waiving the same, the defendants respectfully move that the court alter or amend the judgment heretofore entered in the following respects:

1. By eliminating therefrom and subtracting from the \$22,246.68 judgment the item of \$6,196.66 included as 2 per cent of the "net margin" for the

second year, and the item of \$6,196.66 included as 2 per cent of the "net margin" for the third year, of the term of the manager's agreement, and substituting in lieu thereof an amount equal to 2 per cent of the "net income" of the defendants for those years, as shown by the evidence, which amount, according to the evidence, would be at most \$435.21 for the second year and \$435.21 for the third year.

The grounds for this subdivision of the present motion are that the manager's agreement sued upon calls for the payment to the plaintiff of \$10,000.00 per annum "plus two (2) per cent of the net income" of the defendants, whereas the two (2) per cent of the "net margin" allowed by the court was contrary to and entirely different from the express terms of the contract.

2. By eliminating from the judgment, and subtracting from the \$22,246.68 awarded by the court, the further sum of \$2,100.00 which was allowed as and for the loss by the plaintiff of the deposit made on the house he purchased.

The grounds for this subdivision of the present motion are that under the law relative to damages for breach of contract, compensation is recoverable only for those injuries that the defendant had reason to foresee when the contract was made as a probable result of his breach of the contract, and there was no evidence that at the time of making the contract it was contemplated that Held would buy a home on installments, or that if he was wrong-

fully discharged he would fail to resell the house or would permit the down payment to be forfeited.

3. By eliminating from the judgment and subtracting therefrom the further sum of \$454.00 which was allowed as "expense of travel."

The grounds for this subdivision are that, while the agreement provided for payment to Held of \$500.00 for "moving expenses from Des Moines, Iowa, to Phoenix, Arizona," there was no provision for any further expense of travel, or for expense of going back to Iowa; and when he recovers the full compensation provided in his contract, less what he earned elsewhere, then giving him the expense of returning to Iowa (which would have been a part of his normal expense at the end of his term) would be paying him twice for the same thing.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Memorandum of Points and Authorities

Re Motion for New Trial

In support of the foregoing motion for new trial the defendants submit the following points and authorities:

I.

The attempted employment on behalf of a corporation of a general manager for a term of three

years, when that term would extend beyond the terms of office of all directors and would be contrary to bylaw provisions that the board of directors has power to appoint and remove all officers and that a manager employed by them shall hold office at the pleasure of the board, does not bind the corporation for the full three years, but leaves the board with authority to discharge the manager when the board so desires.

13 Am. Jur., Corporations, Sec. 886, p. 881.

Edwards v. Keller, Texas Civ. App. 133 SW 2d 823.

Tucson Fed. Sav. & Loan Ass'n v. Aetna Inv. Corp. (Ariz.), 245 P. 2d 423.

Leon Farms Corp. v. Beaman, 240 SW 2d 433.

Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13.

Rundell v. Farmers Co-Op., etc., Co. (Mich.), 178 NW 21.

Darrah v. Wheeling Ice & Storage Co. (W. Va.) 40 SE 373.

Note: "Bylaw of corporation authorizing removal of officer, agent or employee at any time as affecting contract of employment for a specified period," 145 ALR 312.

II.

The only resolution of the boards of directors shown in the evidence authorized Smith and Walmsley to employ Held and work out the terms of employment. That resolution was specific and unam-

ambiguous in its provision that both those men were to work out the terms of employment and effect the employment, but the evidence is that Smith alone attempted to make the employment and work out the terms thereof.

The law is, we submit, that when such a corporate resolution authorizes two persons to negotiate and make a contract that does not authorize one of them alone to do so, and the attempt of one alone to do so does not result in a valid contract.

2 Am. Jur, Agency, 201, Sec. 249.

2 C. J. Agency, 668, Sec. 218.

Dorsey v. Strand (Wash.), 150 P. 2d 702.

Egner v. State Realty Co. (Minn.), 26 NW 2d 464.

III.

The mere fact that the plaintiff was dealing with Smith, whom he knew to be an agent of the corporation, constituted under the law a danger signal, so that Held was obliged to make proper inquiry as to the extent of the agent's authority, and was bound by the lack of authority on the part of Smith.

13 Am. Jur., Corporations, 872, Sec. 891.

Brutinel v. Nygren (Ariz.), 152 P. 1042.

Lois Grunow Memorial Clinic v. Davis (Ariz.), 66 P. 2d 238.

Litchfield v. Green (Ariz.), 33 P. 2d 290.

Cameron v. Lanier (Ariz.), 108 P. 2d 579.

Re Motion to Amend Findings

In support of this motion the defendants call the court's attention to Rule 59 of the Rules of Civil Procedure and our position that the findings sought to be eliminated are not supported by the evidence.

Re Motion to Amend Judgment

As authority for making such a motion we cite subdivision (e) of Rule 59 of Rules of Civil Procedure.

In support of our motion to eliminate as items of damages the 2 per cent of "net margin" for the second and third year, and to substitute in lieu thereof 2 per cent of the "net income," we call the court's attention to the fact that "net income" and "net margin," as used in the books and records of the defendant corporations and as understood by both the corporation and the plaintiff, were vastly different from each other. The evidence was that what was known as "net margin" was the whole return from the sale of goods, over and above costs and expenses, and that what was known as "net income" was the return over and above costs and expenses from the sale of goods to non-members of the corporations. The undisputed evidence was that the prices at which commodities were sold to members were fixed at such amounts as were considered ample to pay all costs and expenses, with the express agreement evidenced by the corporate minutes that the amount received for goods bought by members, over and above costs and expenses, was the property

of the members and would be returned to them. This "net margin," except the portion thereof arising from purchases by non-members, was not a "net income" of the company, but was the property of the members held in trust for them. While Mr. Held and Mr. Walmsley testified about some preliminary conversations concerning a percentage of the "net margin," still the undisputed facts are that Smith and Held made the contract for a percentage of the "net income," that Held is suing on this contract without claiming mistake or asking to reform it, and that he cannot be heard to welch on its terms and claim two per cent of the larger amount of "net margin," rather than the smaller amount of "net income" which he contracted for. Such net income was the amount, according to the evidence, upon which the United Producers & Consumers Co-Operative paid income tax, and no income tax was paid on the rest of the so-called net margin, because that was not income but merely trust funds held as the property of the members.

In support of our motion to eliminate as an item of damage the \$2,100.00 allowed for "loss of deposit on house which plaintiff purchased," and to eliminate as an item of damage the \$454.00 allowed for "expense of travel," the defendants submit the following proposition of law:

In awarding damages for breach of contract compensation may be given for only those injuries that the defendant at the time of making the contract had reason to foresee as a natural result in the usual course of events of his breach of the contract.

The rule is set out in McCormick on Damages, page 575, with *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 47 L. Ed. 1171, cited in support of it, as follows:

“To the restriction upon consequential damages in contract, imposed by *Hadley v. Baxendale*, which requires a showing that the loss must be reasonably foreseeable when the contract was made, a new restriction has been added by the federal and many state courts, namely: that the circumstances of the contract must show that the defendant expressly or impliedly agreed to be liable for consequential loss of the sort in question.”

Another statement of the rule as set out in *Twachtman v. Connelly*, 106 Fed. 2d 501, is as follows:

“The rule is firmly established that damages which may be recovered for breach of contract are such as may fairly and reasonably be considered as either arising naturally, that is, according to the usual course of things, from the breach of the contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as the probable result of the breach of it.”

To the same effect:

Restatement of the Law, Contracts, Vol. 1.
Sec. 330.

Woodbury v. Jones, 44 N.H. 206, (loss through selling house not allowed).

Smith v. Pallay (Oregon), 279 P. 279, (loss through purchase of automobile not allowed).

Central Trust Co. v. Clark, 92 Fed. 293, 34 C.C.A. 354.

Respectfully submitted,

LANEY & LANEY,

By /s/ LYNN M. LANEY,

Attorneys for Defendants.

Receipt of copy acknowledged.

[Endorsed]: Filed October 14, 1953.

[Title of District Court and Cause.]

ORDER

The sum of \$2,100.00 allowed as loss on a house purchased by the plaintiff and the sum of \$454.00 allowed as "expense of travel" are eliminated from the judgment entered herein. In all other respects the judgment will stand without further modification.

Dated: February 24, 1954, at Phoenix, Arizona.

/s/ DAVE W. LING,

Judge.

[Endorsed]: Filed February 24, 1954.

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated that Snell & Wilmer be substituted as attorneys of record for defendants United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause in place and instead of Laney & Laney.

LANEY & LANEY,

By /s/ LYNN M. LANEY.

JENNINGS, STROUSS,

SALMON AND TRASK,

By /s/ O. M. TRASK.

SNELL & WILMER,

By /s/ WALTER LINTON,

/s/ EDWARD JACOBSON.

Order

Pursuant to the foregoing Stipulation,

It Is Hereby Ordered, Adjudged and Decreed that Snell & Wilmer be substituted for Laney & Laney as attorneys for the defendants United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause.

Dated this 23rd day of March, 1954.

/s/ DAVE W. LING,

United States District Judge for the District of
Arizona.

[Endorsed]: Filed March 23, 1954.

[Title of District Court and Cause.]

ORDER

Defendants' Motion for New Trial, Motion to
Amend Findings and Motion to Amend Judgment
having been argued November 9-10, 1953, and hav-
ing been submitted November 10, 1953; and

This Court having entered the following Order:

“The sum of \$2,100.00 allowed as loss on a
house purchased by the plaintiff and the sum of
\$454.00 allowed as ‘expense of travel’ are elimi-
nated from the judgment entered herein. In
all other respects the judgment will stand with-
out further modification.

“Dated: February 24, 1954, at Phoenix, Ari-
zona.

“DAVE W. LING,
“Judge.”

on February 24, 1954; and

The foregoing Order having the effect of no Order
on the Motion for New Trial; the effect only by im-
plication of an Order on a portion of the Motion to

Amend Findings, and being only by implication an Order on the Motion to Amend Judgment,

Now, Therefore, Be It and It Is Hereby Ordered as follows:

1. Defendants' Motion for New Trial be denied.

2. Defendants' Motion to Amend Findings be denied except for that portion of the paragraph numbered 6 in the Motion for New Trial (incorporated by reference in the Motion to Amend Findings) which states that the plaintiff was entitled, as items of damage, to “* * * \$2,100.00 for loss of deposit on house which plaintiff purchased, and to \$454.00 for ‘expense of travel’ * * *.” As to the foregoing quoted items, the Court finds the plaintiff is not entitled to recover from the defendants for the same as items of damage or otherwise and instructs that Article VIII of the Findings of Fact be amended in accordance herewith.

3. Defendants' Motion to Amend Judgment be granted in part and denied in part so that plaintiff recover judgment against the defendants and each of them in the sum of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight Cents (\$19,692.68), together with plaintiff's costs in the sum of One Hundred Seventy-two Dollars and Seventy-eight Cents (\$172.78).

Dated this 23rd day of March, 1954.

/s/ DAVE W. LING,

United States District Judge
for the District of Arizona.

Approved as to Form:

JENNINGS, STROUSS,
SALMON AND TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

SNELL & WILMER,
By /s/ WALTER LINTON,
/s/ EDWARD JACOBSON,
Attorneys for Defendants.

[Endorsed]: Filed and docketed March 23, 1954.

Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, defendants in the above-entitled and numbered cause, and each of them, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order entered in the above-entitled and numbered cause on March 23, 1954, in favor of the plaintiff, Ralph W. Held, and against the defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, insofar as said Order of March 23, 1954, denies defendants' Motion for

New Trial; denies in part defendants' Motion to Amend Findings, and grants judgment to plaintiff and against defendants and each of them in the sum of Nineteen Thousand Six Hundred Ninety-two Dollars and Sixty-eight Cents (\$19,692.68), together with plaintiff's costs in the sum of One Hundred Seventy-two Dollars and Seventy-eight Cents (\$172.78).

Dated this 24th day of March, 1954.

SNELL & WILMER,

By /s/ WALTER LINTON,

/s/ EDWARD JACOBSON,

Attorneys for United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, Appellants.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men by These Presents:

That we, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, as Principals, and Fireman's Fund Indemnity Company, a California corporation being a corporate surety, as Surety, are held and firmly bound unto Ralph W. Held in the sum of Twenty Thousand Dollars (\$20,000.00),

to be paid to the said Ralph W. Held, his heirs, executors, administrators or assigns, to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated March 24, 1954.

Whereas, lately in a suit pending in the United States District Court for the District of Arizona, Phoenix Division, between Ralph W. Held, as plaintiff, and United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, as defendants, an Order was entered March 23, 1954, denying defendants' Motion for New Trial: denying in part defendants' Motion to Amend Findings and entering a money judgment against defendants and in favor of plaintiff, Ralph W. Held, all of which more fully appears from said Order of March 23, 1954, and

Whereas, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, have filed a Notice of Appeal to reverse the said Order of March 23, 1954, insofar as the said Order denies defendants' Motion for New Trial; denies in part defendants' Motion to Amend Findings and grants a money judgment to the plaintiff, Ralph W. Held, said appeal being to United States Court of Appeals for the Ninth Circuit.

Now the Condition of This Obligation is such that if United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Whole-

sale, a corporation, shall prosecute their appeal to effect and satisfy the judgment in favor of Ralph W. Held, in full, together with costs, interest and damages for delay, if the appeal is dismissed or if the judgment is affirmed, and satisfy any modification of the judgment and such costs, interest and damages as the appellate court may adjudge and award, then the above obligation to be void; else to remain in full force and effect.

In Witness Whereof, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, have caused these presents to be executed by their corporate officers thereunto duly authorized and said Fireman's Fund Indemnity Company, a corporate surety, has caused these presents to be executed by its attorney-in-fact thereunto duly authorized, all this 24th day of March, 1954.

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE,

By /s/ D. O. ESSLEY,
President.

Attest:

[Seal] /s/ PAULINE McINERNEY,
Assistant Secretary.

SOUTHWEST CO-OPER-
ATIVE WHOLESALE,

By /s/ D. O. ESSLEY,
President.

Attest:

[Seal] /s/ PAULINE McINERNEY,
Assistant Secretary.

FIREMAN'S FUND
INDEMNITY COMPANY,

[Seal] By /s/ C. G. SULLIVAN,
Attorney-in-Fact.

State of Arizona,
County of Maricopa—ss.

Before me, the undersigned authority, on this day, personally appeared D. O. Essley, as President of both United Producers and Consumers Co-Operative and Southwest Co-Operative Wholesale, corporations, and Pauline McInerney, as Assistant Secretary of both of the aforesaid corporations, each being known to me to be the person whose name is signed to the foregoing bond and to be the officers thereof as respectively appears from said instrument, and each acknowledged to me that he executed the foregoing bond as the act and deed of said corporations, being thereunto duly authorized and qualified.

In Witness Whereof, I hereunto set my hand and official seal this 23rd day of March, 1954.

[Seal] /s/ HARRY E. PURDY,
Notary Public.

My commission expires March 25, 1957.

State of Arizona,
County of Maricopa—ss.

Before me, the undersigned authority, on this day personally appeared C. G. Sullivan, known to me to be the person whose name is affixed to the foregoing bond as Attorney-in-Fact for Fireman's Fund Indemnity Company, a corporation, and acknowledged to me that he executed the foregoing Supersedeas Bond as the act and deed of said Fireman's Fund Indemnity Company, a corporation, being thereunto duly authorized and qualified.

In Witness Whereof, I hereunto set my hand and official seal this 24th day of March, 1954.

[Seal] /s/ ALMA J. NORMAN,
Notary Public.

My commission expires 1-3-57.

Form of Bond and Sufficiency of Its Surety Approved:

/s/ DAVE W. LING,
United States District Judge
for the District of Arizona.

[Endorsed]: Filed March 24, 1954.

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD ON APPEAL

Good cause appearing therefor,

It Is Ordered that the time for filing the Record on Appeal and docketing the appeal herein in the

United States Court of Appeals for the Ninth Circuit be and it is extended to and including June 22, 1954.

Dated at Phoenix, Arizona, this 26th day of April, 1954.

/s/ DAVE W. LING,
United States District Judge.

[Endorsed]: Filed April 26, 1954.

[Title of District Court and Cause.]

STIPULATION AND ORDER OF SUBSTITUTION OF ATTORNEYS FOR DEFENDANTS

It is Hereby Stipulated that Scoville & Linton be substituted as attorneys of record for the Defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause in the place and stead of Snell & Wilmer.

JENNINGS, SROUSS,
SALMON & TRASK,

By /s/ O. M. TRASK,
Attorneys for Plaintiff.

SNELL & WILMER,
By /s/ EDWARD JACOBSON,
Attorneys for Defendants.

SCOVILLE & LINTON,
By /s/ WALTER LINTON.

Order

Pursuant to the foregoing Stipulation.

It Is Hereby Ordered, Adjudged and Decreed that Scoville & Linton be substituted for Snell & Wilmer as attorneys for Defendants, United Producers and Consumers Co-Operative, a corporation, and Southwest Co-Operative Wholesale, a corporation, in the above-entitled and numbered cause.

Dated this 17th day of June, 1954.

/s/ DAVE W. LING,

United States District Judge
for the District of Arizona.

[Endorsed]: Filed June 17, 1954.

United States District Court
District of Arizona

1798 Civil

RALPH W. HELD,

Plaintiff,

vs.

UNITED PRODUCERS & CONSUMERS CO-
OPERATIVE, et al.,

Defendants.

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing before the Honorable Dave W. Ling, one of the

judges of the above court, in his courtroom in the United States Courthouse, Phoenix, Arizona, on the 10th day of June, 1953.

Appearances:

OZELL M. TRASK,

L. M. LANEY.

Whereupon, the following proceedings were duly had:

The Clerk: 1798, Phoenix, Ralph W. Held, Plaintiff, vs. United Producers and Consumers Cooperative, et al., for trial.

The Court: Are you ready, gentlemen?

Mr. Trask: Plaintiff is ready.

Mr. Laney: Defendant is ready.

The Court: Very well, you may proceed.

Mr. Trask: Before the taking of evidence, the plaintiff would like to invoke the rule for the exclusion of witnesses.

The Court: All right.

(Discussion off the record.)

The Court: I don't think I will invoke the rule. Anybody who wants to stay here can stay.

(Opening statement by Mr. Trask.)

RALPH W. HELD

plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Trask:

Q. Would you state your name for the Court, please. A. Ralph W. Held.

Q. What is your present address, Mr. Held?

A. 5432 North Indiana, Kansas City, Missouri.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. What is your present occupation, Mr. Held?

A. I am manager of a co-operative having its office in North Kansas City known as Consumers Co-Operative Services, Inc.

Q. For the record, what is your age at the present time? A. 48.

Q. Mr. Held, prior to the time you came to Phoenix to manage the defendant corporations, had you had any experience in management of co-operative organizations? A. Yes, I had.

Q. Generally what was that experience?

A. Well in 1938 I became manager of the Farm Service Company at Storm Lake, Iowa, which was a co-operative company dealing largely in petroleum products and after 8 years in the service of that company I was made manager of the State Co-Operative Wholesale which was known as Iowa Farm Service [5*] Company at Des Moines, Iowa.

Q. How long did you serve with that company?

A. 6 years.

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

Testimony of Ralph W. Held.)

Q. Do you have any educational background generally to qualify you for work with agricultural co-operative organizations?

A. Well, I have a bachelor of science degree from Iowa State College at Ames, Iowa.

Q. What kind of school is that?

A. That is an agricultural land grant agricultural college.

Q. Is it a state institution? A. Yes, sir.

Q. And at that college what was your specialty or major or however they designate the principal emphasis of your education?

A. My degree was in agricultural.

Q. Prior to college did you have any practical experience in agricultural work, farm work?

A. Yes, I was born and reared on a 400-acre Iowa farm where usual farm practices were carried out and we had a herd of pure-bred livestock for some 50 years continuously on that farm and feed livestock in a rather large way.

Q. Your experience with co-operatives in [6] Iowa—in your experience what products did the co-operatives that you managed there handle?

A. The local co-operative I managed at Storm Lake, Iowa, dealt primarily in petroleum products, but it also handled some chemicals such as weed killers and dealt somewhat in fertilizer, but petroleum products were their biggest end of the business.

Q. Other than some variation in the type of products was there any essential difference in the

(Testimony of Ralph W. Held.)

type of business that you were managing in Iowa through your career and the type of business that was managed in Arizona?

A. No, there was no essential difference. There is some little difference in the major emphasis of commodities, but actually no essential difference in the type of business.

Q. Now what were you doing when you were first contacted about coming to Phoenix?

A. I was employed by the Iowa Farm Service Company at Des Moines, Iowa.

Q. In what capacity were you employed there?

A. I was in charge of the purchasing of all petroleum products and chemicals.

Q. How was that first contact made? How [7] did you first become aware of the Phoenix need for a manager?

A. I received a letter, I believe it was sometime in December from Mr. Martin of Southwest Co-Operative Wholesale.

Q. That was December of what year?

A. Of 1951.

Q. And that was the first contact that was made by the local organization with you?

A. Yes, sir.

Q. Did you answer that letter?

A. Yes, I did.

Q. Did anything develop immediately as a result of those two communications?

A. I think I had a reply early in January or the

(Testimony of Ralph W. Held.)

very latter part of December suggesting that since the——

Mr. Laney: Pardon me, may we have the letters? We object to the contents without the best evidence.

The Court: I don't know that he is going to say there was a letter.

Mr. Laney: He said what the letter suggested. I think the objection, if the Court pleases, was sound, that he was stating the contents of the letter. [8]

The Court: Well I didn't gather that. Go ahead.

A. Well the letter suggested a meeting in Chicago between myself, Mr. Walter Smith, who was president of, I believe, Southwest Co-Operative Wholesale and United Producers and Consumers, and Mr. Wahmsley. The occasion was the annual meeting of the National Council of Farmer Co-Operatives which all of us were attending.

Q. Did you attend that meeting? In Chicago?

A. Yes, sir.

Q. About when did that meeting in Chicago occur? A. About the middle of January.

Q. Of 1952? A. Yes, sir.

Q. Did Mr. Smith and Mr. Wahmsley contact you at that meeting? A. Yes, sir.

Q. You say Mr. Smith was president of both of the defendant organizations at that time?

A. That is my understanding.

Q. Did they tell you that? A. Yes, sir. [9]

Q. Was Mr. Wahmsley an officer or connected with those two organizations also?

(Testimony of Ralph W. Held.)

A. I understand that he was the auditor.

Q. What kind of meeting was in Chicago, Mr. Held?

A. Well, it was a very informal little meeting in Mr. Smith's room in the hotel.

Q. Excuse me for interrupting. What kind of meeting was the general meeting that all of you were attending in Chicago?

A. It was the annual meeting of the National Council of Farmer Co-Operatives, I believe.

Q. And were representatives of all the larger co-operatives in the United States present at that meeting?

A. Yes, and a great many other people that were directly interested in co-operatives in one way or another.

Q. Had Mr. Smith and Mr. Wahmsley desired to obtain information about you and your experience at that meeting, were the people at that meeting who were able to give them that information as to your record and your achievements and your progress?

A. Well, I would think they could have gotten it from quite a number of people that were there with [10] whom I was personally acquainted.

Q. And do you know whether they made any efforts to obtain such information or not?

A. I don't know that they did at that time. I don't know whether they did or not.

Q. Now, at that Chicago meeting did you have discussions with Mr. Smith and Mr. Wahmsley

Testimony of Ralph W. Held.)

about the Phoenix operation? A. Yes, I did.

Q. When and where did they occur?

A. Well, they occurred the first one was in Mr. Smith's room at the hotel at which we were staying where the meeting of the National Council of Farmer Co-Operatives was being held.

Q. And who was present at that meeting, Mr. Held?

A. Mr. Smith and Mr. Wahmsley and myself.

Q. What discussion took place there about the Phoenix situation and your connection with it, if any?

A. It was a very general discussion, more for the purpose of getting acquainted I think than anything else and Mr. Smith told me a little bit about the two corporations out here of which he was president and suggested that they were needing management and were [11] interested in talking to me about it. I believe at that time I told them that I had already been approached by a firm in St. Louis and while I hadn't made a positive commitment to them I was somewhat interested in that opportunity and wouldn't consider coming out here for less than a 3-year term.

Q. As a result of that conversation was there any suggestion made by either Mr. Smith or Mr. Wahmsley in furtherance of the Phoenix connection?

A. Well, we had 2 or 3 meetings there during the session of the National Council and I believe it was at the final meeting that we had that Mr.

(Testimony of Ralph W. Held.)

Smith suggested that he would like to have me come out and look the proposition over and would be glad to pay me my expenses if I would come.

Q. Had any final arrangement been made at that time of any kind between you?

A. No, sir.

Q. As a result of that offer by Mr. Smith, or suggestion, did you come to Phoenix?

A. Yes, I did, some week or more later.

Q. About when would that be, do you recall, Mr. Held?

A. I couldn't say the date positively, but it was in January of 1952. [12]

Q. Did the defendant corporations pay your expenses for that trip? A. Yes, they did.

Q. When you arrived in Phoenix who met you?

A. Mr. Smith met me at the plane at the Phoenix airport.

Q. Do you recall about when you arrived?

A. I arrived in the evening at about 9:00 o'clock.

Q. How long did you stay in Phoenix on that occasion?

A. I believe I was out here until—I believe I was out here 2 days.

Q. And what transpired during that time with respect to the matter that is under investigation here?

A. Well, the morning following my arrival Mr. Smith picked me up at the hotel and took me out to the plant and offices of the two corporations. I

Testimony of Ralph W. Held.)

met Mr. Martin, who was then manager and he showed me through the plant in the company of Mr. Smith.

Q. Do you know his initials?

A. C. M. Martin. We discussed the operation somewhat and I recall asking Mr. Martin how long he [13] thought it would take a new man coming in here to become thoroughly acquainted with the operation and he told me that he would——

Mr. Laney: Object to any conversation with Mr. Martin as hearsay. No foundation laid that he had any authority to bind any of these companies.

Q. Did Mr. Martin have any relation with the defendant companies at that time?

A. I understand he was manager.

Q. Was he also on the Board of Directors?

A. Yes, I believe he had the title of executive vice president.

Q. Then what did he say to you at that time?

Mr. Laney: I object. It calls for hearsay and no foundation laid, that he had any authority.

The Court: As I recall the evidence Martin wrote you a letter in December, didn't he?

The Witness: Yes.

The Court: Go ahead.

A. Mr. Martin said that he would delay answering my question until the following day at which time Mr. Smith and I were back in the offices and Mr. Martin said at that time that in his opinion it would [14] require from 2 to 5 years.

(Testimony of Ralph W. Held.)

Q. To learn the business thoroughly?

A. To get thoroughly grounded in the operation

Q. Now what else did you do on the occasion of that visit other than your trips around in the company of Mr. Smith and your conversations with Mr. Martin, the then manager?

A. The evening after I arrived here Mr. Smith invited me to a dinner at the Westward Ho Hotel at which several people representing the company were present.

Q. Who was present representing the company on that occasion?

A. Mr. Smith and his wife, Mr. and Mrs. Wahmsley and Mr. and Mrs. McInerney and Mr. and Mrs. Martin, I believe.

Q. Mrs. McInerney—what capacity did she have with the two organizations, to your knowledge?

A. Well, I understand that she was in charge of purchasing of some of the chemicals and feed supplies and so forth.

Q. Do you know whether she had an appointive office with the corporation?

A. I learned later that she did have. I [15] wasn't aware of it at that time.

Q. Following that dinner meeting, what transpired then?

A. The next morning Mr. Smith met me again and took me out to the company offices and that was when Mr. Martin gave me the reply that I earlier indicated. Following that, Mr. Smith drove

Testimony of Ralph W. Held.)

me around the Valley somewhat, took me out to his own farm and I left on a plane that evening for Des Moines.

Q. Did you have any further conversation with Mr. Smith on the occasion of that visit about coming to Phoenix as the manager of the defendant companies?

A. Nothing formal. He didn't make any offer and nothing actually was said about it except that he told me he hoped that I would be interested, to which I replied that I could not be under the circumstances because it appeared that they had management.

Q. You told him then that you were not interested under the present circumstances?

A. That is right.

Q. You returned then to your position in Des Moines? A. That is right. [16]

Q. When were you next contacted by anyone from Phoenix with respect to this employment?

A. I was contacted by telephone the latter part of February. Mr. Smith called me.

Q. Still talking about Mr. Smith, the president of both defendant corporations? A. Yes, sir.

Q. What was the nature of that conversation? What was it as you recall it?

A. I believe it was at that time that I told him that the situation with me had developed to a point that I felt that I was almost committed on a position in St. Louis and didn't believe I would be interested.

(Testimony of Ralph W. Held.)

Q. Why did Mr. Smith call you and you make those responses?

A. He called me and told me that their situation had also changed, that Mr. Martin had resigned and that they were definitely interested in making a proposition to me.

Q. Following that conversation what next took place?

A. I think it was just a couple of days later that he called me again, rather insistent that I come out and offered again to pay my expenses out [17] if I would come out and take a second look at their proposition.

Q. Did you come out at his request?

A. Yes, I did then finally and arrived here I believe the evening of March 5.

Q. 1952? A. 1952.

Q. Who met you when you arrived at that time?

A. Walter Smith met me in a plane and took me to my hotel that evening.

Q. How long did you stay in Phoenix on the occasion of that visit?

A. I left on the evening March 7.

Q. On the following day after your arrival March 6 what did you do?

A. Mr. Smith again called for me at the hotel in the morning, took me out to the plant and offices of the corporation. We spent a little time there. He drove me around the town just a little bit and we had a luncheon at the Westward

Testimony of Ralph W. Held.)

To Hotel that noon at which several of the company directors were present.

Q. Do you recall what of the company directors were present on that luncheon meeting?

A. I don't know whether I can recall all of [18] them or not but I know Dana Fisher was there. Mr. Smith of course was there. Emil Rovey was there. Mr. Wahmsley was present and I don't recall whether there were any others or not.

Q. Did you have any discussions at that luncheon meeting with either Mr. Smith or any of the other directors about becoming the manager of the local defendant corporation?

A. I don't think anything except just an informal discussion because there was a board meeting called for that afternoon of the entire board.

Q. Did you give any indication or were there any questions directed to you at that time concerning your qualifications or past experience, anything of that sort?

A. I can't recall any specific conversation at the dinner.

Q. Very well, then after the luncheon meeting did you attend the board meeting that was scheduled for that afternoon of March 6?

A. I attended a portion of it.

Q. And that was what kind of a meeting?

A. Well, I understood that that was a meeting of the full Board of both corporations and they called me in to interview me concerning accepting the [19] position as manager.

(Testimony of Ralph W. Held.)

Q. What discussion did you have at that meeting with the members of the Board? Did they make any inquiries of you, and tell the Court what those were?

A. Yes, they invited me into the meeting and asked me to relate my business experience which I had, which covered the period of management of the two co-operatives back in Iowa which I had previously managed and I think I went back to the time that I graduated from Iowa State College and spent 4 years as a county agricultural agent in one of the northwest Iowa counties and then spent 4 years as a farm loan representative for the farm loan division of the Aetna Life Insurance Company, after which I spent all of my time in co-operative management.

I believe I also told them that while I was here interested in their proposition that I was tentatively committed, at least I felt that I was, on a job in St. Louis with a corporation with which I had been familiar for some time, and that they were offering me a job at \$10,000 per year and that under the circumstances I couldn't consider coming out here for less than a 3-year term.

Q. Did any of the members of the Board of [20] Directors make any objection to your statement that you wouldn't consider coming out here for anything less than a 3-year term?

A. Not that I was aware of.

Q. Did any of them say anything at that time?

A. No, sir.

Testimony of Ralph W. Held.)

Q. Following your general discussion were you here when any action of the Board was taken with respect to your employment?

A. No, sir, I was not.

Q. Were you excused from the meeting before it was concluded? A. Yes, sir.

Q. And thereafter who did you next see with respect to employment after you left the meeting?

A. After the meeting was over, Walter Smith took me back to the hotel and suggested that he had arranged a meeting for me or a dinner engagement for me that evening with Mr. Wahmsley and that since Mr. Wahmsley was auditor of the 2 corporations he had information that wasn't as well known to Mr. Smith and that he would therefore like to have me spend some time visiting with Mr. Wahmsley about this matter.

Q. Did he say anything to you at that [21] time as to any authorization to enter into a contract?

A. He told me that the Board had given him authority to employ me and wanted me to talk to Mr. Wahmsley—to talk to me the following day.

Q. Up to that time had you discussed any of the details of your employment with either Mr. Smith or Mr. Wahmsley? That is, regarding the amount of compensation and the term of your employment and so forth?

A. Yes, we had talked about a 3-year term and we had talked more or less informally about—
Mr. Laney: Who had?

(Testimony of Ralph W. Held.)

Q. You had talked with whom?

A. With Mr. Smith and we discussed a 3-year term and had discussed a \$10,000 annual salary with some percentage of the net savings of the 2 companies.

Q. Then did you keep the engagement that Mr. Smith had made for you with Mr. Wahmsley that evening?

A. Yes, we had dinner that evening at the Arizona Club and spent an hour or 2 together.

Q. Who was present at that meeting?

A. Just Mr. Wahmsley and myself.

Q. And did you and Mr. Wahmsley discuss—what did you discuss during that hour or two that you were together? [22]

A. I think we discussed primarily the terms of employment dealing principally with salary percentage of the net savings and term of employment.

Q. What was the discussion with Mr. Wahmsley concerning the term of employment?

A. Primarily had to do with the 3-year term because I had indicated early that that was the only thing that I would be interested in.

Q. Did Mr. Wahmsley make any objection to that? A. Not to my knowledge.

Q. Did he say anything upon that occasion objecting to it at all?

A. I don't recall that he did.

Q. Was there any discussion as to the specific amount of compensation? That is, the fixed compensation?

Testimony of Ralph W. Held.)

A. I think we were discussing primarily \$10,000 per year.

Q. Now what day was this that you had the inner meeting with Mr. Wahmsley?

A. That would have been the evening of March 6.

Q. Then after—did you return to your hotel after your meeting with Mr. Wahmsley?

A. Yes, sir.

Q. What took place on March 7? [23]

A. Mr. Smith called for me again at the hotel in the morning, took me on quite an extended tour of the valley here, and brought me back to the hotel sometime that—I mean the company offices sometime that afternoon.

Q. Did you have any further discussion about our contract that afternoon with Mr. Smith?

A. Yes, we did. We discussed it further in the office.

Q. That is in the office of the——

A. Of the two corporations.

Q. Following that conversation what was done?

A. Well, late that afternoon Mr. Smith rather insisted that we draw up a memorandum of agreement. I informed him that I didn't feel personally that it was necessary, that I had never worked under a written contract and it would be perfectly agreeable with me if we would wait until I actually decided to accept the position and if I came out here the 1st of April, to draw up an agreement at that time. However, he wanted something in writ-

(Testimony of Ralph W. Held.)

ing, he said, and we therefore prepared the type of contract under which I was employed.

Q. Who was present at the time the agreement that you have testified about was prepared? [24]

A. Walter Smith, Mrs. McInerney and myself.

Q. Who dictated the terms of it or prepared it, Mr. Held?

A. Well, Mr. Smith asked me to dictate it, said he wasn't familiar with such matters, and I believe before we got into that I advised him that since he didn't have a form available, that I did have with me a copy of a contract that was used by the member companies of the Iowa Farm Service Company for the employment of managers. It was a three-page document which was multigraphed and which we used among all of our companies associated with the Iowa Farm Service Company and from that we simply dictated 3 or 4 short paragraphs on which Mr. Smith and I agreed and which we thought would be sufficient to cover the matter.

Q. When you say you dictated them, to whom did you dictate the agreement?

A. To Mrs. McInerney.

Q. And that is the Mrs. McInerney who you have testified was the appointive officer of the corporation of some sort.

A. Yes, sir.

Q. And that was on the late afternoon or early evening of—— [25]

A. March 7.

Q. What was done with the agreement which was dictated at that time?

(Testimony of Ralph W. Held.)

A. That was written up in triplicate and Mr. Smith signed 2 copies which he handed to me and suggested that I take them back to Des Moines, Iowa, with me and if I decided to come out here, to sign a copy and send one back to him.

Q. Did you sign the contract at that time?

A. No, sir, I did not. I had a tentative appointment in St. Louis for, I believe, it was March 15 with Mr. K. C. Baker with whom I was negotiating about this job that I had mentioned previously and upon my return home I found that Mr. Baker had advised me by letter that he wouldn't be able to keep that appointment and suggested that I meet him in St. Louis on the 20th, after which I notified Mr. Smith that I was signing a copy of the contract and mailing it to him.

Q. Now, you say that you took the two signed copies that Mr. Smith had signed back to Des Moines with you pending your determination of the St. Louis offer? A. Yes, sir.

Q. And then when you—when did you determine in your mind what you wanted to do about the St. Louis [26] offer, Mr. Held?

A. When I was in St. Louis on March 20.

Q. And was that offer still available to you and could you have accepted it in St. Louis at that time had you wanted to? A. Yes, sir, I could have.

Q. And you came back to Des Moines and what was the occasion of any further communication with Mr. Smith?

A. Well, I arrived back in Des Moines in the

(Testimony of Ralph W. Held.)

early morning of March 20 and found a long distance telephone call waiting for me when I arrived at home. I called back on that call and talked to Mr. Smith concerning the matter, told him that I would sign the contract, and he asked me to come out here and be ready to go to work on the first day of April.

Q. Did you tell him that you were putting a signed copy of the contract in the mail?

A. Yes, sir, I mailed it the next morning, I believe.

Q. And you signed it and went out the next morning? A. I think that was it.

Q. I show you Plaintiff's Exhibit 1 for identification and ask you to state whether or not that is [27] the contract about which you have just been testifying? A. Yes, sir, that is it.

Mr. Trask: Offer it in evidence.

Mr. Laney: If it please the Court, we object to this on the ground that there is no foundation laid that Smith was authorized to enter into any such contract.

The Court: It may be received. We will have our morning recess.

(A brief recess was had.)

(Plaintiff's Exhibit 1 received in evidence.)

Q. Mr. Held, at the time when you were present with Mr. Smith in the company's offices after the contract had been dictated to Mrs. McInerney and

Testimony of Ralph W. Held.)

was executed by Mr. Smith on behalf of the two corporations, was Mrs. McInerney present during that entire period of time? A. Yes, sir.

Q. Was she present at the time Mr. Smith executed the document on behalf of the two corporations? A. Yes, sir.

Q. Did she offer any objection or suggestions as to the manner of execution in any way?

A. No, sir.

Q. Now after you telephoned or after Mr. [28] Smith telephoned you in Des Moines and you told him that you were signing the contract and putting it into the mails to him, did you hear anything further from Phoenix before you actually came out here to assume your duties?

A. Yes, I had a wire, I believe, from Mrs. McInerney the latter part of March stating that Mr. Smith had passed away very suddenly and giving me the date of his funeral. I called her on the telephone and told her that I was very sorry, but it didn't appear that it would be possible for me to get out here to the funeral and that I would be out here the 1st of March, I mean the 1st of April.

Q. Did you come to Phoenix on the 1st of April?

A. Yes, sir, I actually arrived here on March 31.

Q. And on the 1st of April what did you do?

A. I went to the office first on March 31 and then went there again on the morning of April 1 and assumed the management of the company.

Q. You did go to work at the company offices and assume the duties of manager at that time?

(Testimony of Ralph W. Held.)

A. Yes, sir.

Q. During the month of April did you ever [29] meet with any of the members of the Board of Directors or see any of them in your capacity as manager?

A. Yes, sir, there was a board meeting soon after I came here, I believe it was on the 3rd of April. I think it was called specifically for the purpose of electing a successor to Mr. Smith as president.

Q. Did you attend that meeting of the Board of Directors? A. Yes, sir.

Q. And did you attend any other meetings of the Board of Directors while you were—during the month of April?

A. Yes, there was another board meeting called the latter part of the month along about the 24th or 25th, I believe, somewhere in that approximate time.

Q. Now, at any time after you reported for duty or before you reported for duty, at any time did the officers of the corporation or the members of the Board of Directors at any time give you any special instructions as to how you were to go about acquainting yourself with the business or with the community and your affairs?

A. No, they did not. [30]

Q. Beginning then April 1, generally what did you do in connection with the management of the corporation?

A. Well, that first week I was in the office most of the time. I believe I made a trip out to Mrs.

(Testimony of Ralph W. Held.)

W. L. Smith at Glendale one afternoon to extend my sympathy for the loss of her husband. The second week I called on the members of Southwest Co-Operative Wholesale who were other co-operatives most of which were located in Southern California.

Q. Was that in connection with your duties as manager of the defendant corporation?

A. Yes, sir, these corporations were members of Southwest Co-Operative Wholesale and the corporation that I had been managing had some 30 members and all of them bought their supplies from us and I wanted to find out what the state of affairs was between Southwest Co-Operative Wholesale and its member companies.

Q. And that took up most of your time during the second week of April, did it?

A. Yes, sir, it did.

Q. Did you have any conversations or go out and make any effort to meet any members of the Board individually, talk to them?

A. Yes, most of the week following my contact with [31] the co-operative companies I spent calling on various members of the Board of Directors.

Q. And where would you call on the members of the Board?

A. I found most of them at their farms and ranches.

Q. Are the members of the Board of Directors of these two companies—do they spend all of their

(Testimony of Ralph W. Held.)

time at the company offices or do they have other occupations and pursuits?

A. Well, I don't think you would say they spend any of their time there, to speak of. They call there occasionally like maybe any other customer might, but they spent no appreciable time there.

Q. Generally what are their occupations, the members of the Board of Directors, their principal occupation?

A. Most of them I would say were engaged in agriculture.

Q. Now during the first month that you were there did you meet any of the department heads or the staff heads of the various departments of the defendant corporation?

A. Yes, sir, the first week that I was there [32] Ernie Huber took me around and introduced me to all of the department heads.

Q. Who is Ernie Huber?

A. He is an employee who was described to me as being in general supervision over the various stores down there.

Q. What stores? When you say the stores of the co-operative what stores do you refer to?

A. The hardware store, the lumber yard, the furniture store, probably even the feed store.

Q. Now, did you hold during the month of April any staff meetings with the members of the various heads of departments of the co-operative down there?

A. We held staff meetings during the time I

(Testimony of Ralph W. Held.)

was there, but I am not clear on the date when we first initiated them. We held some 2 or 3 staff meetings.

Q. By staff meetings what do you mean?

A. Meetings of the heads of the various departments.

Q. Those meetings were called by whom?

A. By myself.

Q. During the month of May, for instance, did you hold any staff meetings? [33]

A. Yes, I am quite sure that we had two in May.

Q. Without going into any detail, what was the general nature and purpose of the staff meetings and how were they held?

A. They were held in my office for the purpose of discussing any of the problems that the heads of the various departments thought might be of general interest to the heads of all of the other departments.

Q. And those staff meetings were held, how many do you recall did you hold?

A. Well, we held 2 in May and I am not clear on whether we actually held a staff meeting in April or not.

Q. You say there were 2 meetings of the Board of Directors which you attended during the month of April?

A. Yes, sir.

Q. Was there any meeting of the Board of Directors you attended during the month of May?

A. Yes, sir.

(Testimony of Ralph W. Held.)

Q. About when was that?

A. It was about the 24th or 25th of May, approximately that period. [34]

Q. Now, Mr. Held, up to that time had you been criticized in any way by any officer or director of the corporation as to the manner in which you were performing your duties as manager?

A. No, sir.

Q. About what time was the meeting in May that you referred to? What date?

A. It was the latter part of the month, I have forgotten the exact date, 24th, 25th, or 26th, somewhere in that period.

Q. Did you attend these various meetings of the Board of Directors as you have testified about as manager of the corporation? A. Yes, sir.

Q. After the meeting of the Board of Directors on May—the latter part of May, whenever it was, what did you do?

A. Well, it was that evening that I had planned to fly back to Des Moines to bring my family out here since school had terminated and I had given possession of my home on the 1st of June.

Q. Had you ever discussed with the members of the Board of Directors the necessity for your returning to Des Moines to bring your family out? Had that been mentioned at any time? [35]

A. I don't think it had been officially in a board meeting, but I had mentioned to various ones at various times that that was the situation and Walter Smith had agreed that that was the proper thing

Testimony of Ralph W. Held.)

Q. To do and Emil Rovey asked me that day when I was going back after my family and I told him that I planned to go back that evening.

Q. And what is Emil Rovey's capacity with either of the corporations?

A. He is a director.

Q. Did any of them ever voice any objection to our making that trip to get your family and bring them out here? A. No, sir.

Q. And you did return to your home in Des Moines to bring your family? A. Yes, sir.

Q. What arrangements had you made in Des Moines for bringing your family out here?

A. Well, prior to that time I had sold my home and had given possession on June 1 and had planned to go back when the spring school term ended to bring them out to Phoenix.

Q. And had those arrangements been completed for the sale of your home and giving possession when you [36] arrived there? A. Yes, sir.

Q. Did you receive a telegram while you were here from the defendant corporations or one of their representatives?

A. Yes, sir, we had finished packing our furniture one night and were planning to leave for Phoenix the next morning and a wire reached me I believe about 1:00 or 2:00 that morning.

Q. That is the same morning that you were planning to leave and come to Phoenix with your family? A. Yes, sir.

Q. You had stored your furniture at that time?

(Testimony of Ralph W. Held.)

A. We hadn't stored it yet because we were planning to load it on a moving van that morning to bring it out here.

Q. I hand you Plaintiff's Exhibit 2 for identification and ask you to state, is that the telegram that you state you received at that time?

A. Yes, sir.

Mr. Trask: Offer Plaintiff's 2 in evidence.

Mr. Laney: No objection. [37]

(Plaintiff's Exhibit 2 received in evidence.)

Q. Following the receipt of that telegram did that require you to make any change in your plans or did you make any change in your plans?

A. Yes, sir, I had to find temporary living quarters for my family almost immediately and I consulted counsel in Des Moines to determine what my position was.

Q. Up to that time had there been any suggestion of any kind that your contract was illegal or being questioned? A. No, sir.

Q. Was there any elaboration given you at that time as to what the supposed illegality of your contract was?

A. No, sir, the wire was the only communication.

Q. Had you been criticized as to your employment or charged with any violation of the terms of your employment up to that time?

A. No, sir, not to my knowledge.

Q. Following the receipt of the telegram you say you did consult counsel? A. Yes, sir.

Testimony of Ralph W. Held.)

Q. And thereafter what did you do? [38]

A. He advised me to——

Q. No, just what—did you respond to the telegram?
A. Yes.

Q. I show you Plaintiff's 3 for identification and ask you to state what that is.

A. That is the wire that I sent in response to the telegram sent me.

Mr. Trask: Offer Plaintiff's Exhibit 3 for identification, exhibit next in evidence.

Mr. Laney: No objection.

(Plaintiff's Exhibit 3 received in evidence.)

Q. Following the mailing of that or the transmitting of that telegram to Mr. Essley, what did you do, Mr. Held?

A. I took my family to Sioux City, Iowa, where I arranged for temporary living quarters for them, came back to Des Moines and flew out to Phoenix.

Q. When you arrived in Phoenix did you go to see anybody with respect to the communication you had received?

A. Yes, I did. I called on several members of the Board of Directors.

Q. Did you call on Mr. Essley, who sent you the telegram? [39]
A. Yes, sir.

Q. Where did you see him and when?

A. I saw Mr. Essley at his farm. I don't recall the day exactly.

Q. Was it shortly after you returned?

A. Shortly after I returned.

(Testimony of Ralph W. Held.)

Q. Was anyone else present at that time?

A. I don't recall that there was. His son was working on some machinery near there when we discussed this wire.

Q. What did you say to Mr. Essley and what did he say to you?

A. I think I called his attention to the fact that I had gotten his wire and merely expressed the fact that I was surprised to have received word in that sort of way since we had had a board meeting just prior to my going back after the family and no one had said anything to me.

Q. And what did he say to you?

A. He told me that they had a board meeting called for the 9th of June and would discuss the entire matter at that time.

Q. Did he give you any reason for suspecting your contract was in question?

A. Not specifically that I recall. [40]

Q. Did he at that time say you hadn't been performing your duties properly?

A. No, he didn't.

Q. Did he charge you with any violation of your contract?

A. No, sir.

Q. What other members of the board did you call upon as a result of this receiving of the wire?

A. Before I called on Mr. Essley I stopped at Mr. Rovey's farm on my way out and had a little discussion with him also.

Q. Mr. Rovey is one of the directors?

A. Yes, sir.

Testimony of Ralph W. Held.)

Q. What was your conversation with Mr. Rovey and what did he say to you?

A. I told him about the wire that I had received and asked him if he knew anything about it. He said that he didn't know a great deal about it and suggested that possibly the man to talk to was Mr. Jessley.

Q. Did he charge you at that time with any violation of the terms of your contract?

A. No, sir.

Q. Did he criticize your manner of conducting yourself as manager at that time? [41]

A. Not to my knowledge.

Q. Did he at that time? A. No, sir.

Q. Did he elaborate in any way upon the meaning of the telegram that your contract was illegal?

A. No, sir.

Q. Did you discuss the telegram with any other members of the Board of Directors prior to the meeting of June 9?

A. Yes, sir, I called on Mr. Knox and Mr. Fisher.

Q. Who is Mr. Knox?

A. Mr. Knox was a board member and I believe secretary of one of the companies.

Q. And where does he live?

A. At Chandler or near Chandler, Arizona.

Q. What was your conversation with Mr. Knox?

A. I told him also about the wire and he was surprised to learn it. He had no previous knowledge of it whatever.

(Testimony of Ralph W. Held.)

Q. So he had no explanation and didn't know anything about it? A. No. [42]

Q. That is what he said to you?

A. That is right.

Q. Who is Mr. Fisher?

A. Mr. Fisher is also a board member who lives at Blythe, California, and he likewise had no previous knowledge and did not know until I advised him that I had received such a wire.

Q. Did either Mr. Knox or Mr. Fisher say anything to you in a way critical of the way you had managed the corporation or charging you with any violation of the terms of your contract?

A. No, sir, they did not.

Q. Did you hear anything further about the matter until the meeting of June 9?

A. No, I don't believe I did.

Q. Actually how many days transpired between your meeting with these various members of the board and the meeting of June 9? Was it a short period of time?

A. Just a short period of time, yes.

Q. Now on June 9 was there a meeting of the Board of Directors held to your knowledge?

A. Yes, sir.

Q. Where was it held?

A. In the company office at the plant. [43]

Q. Did you attend that meeting?

A. No, sir, I did not.

Q. Was that the first meeting of the Board of

(Testimony of Ralph W. Held.)

Directors since you arrived in Phoenix that you did not attend?

A. I attended a portion of it, but I was not in the meeting all of the time.

Q. Was there any discussion during the time you were at the meeting during the portion of the meeting that you attended, was the matter of your contract discussed during that period of time?

A. No, only that Mr. Essley advised me that they had had it under consideration and he told me that they considered that they had placed me in an impossible position and had appointed a committee to negotiate with me for the settlement of my contract.

Q. Now at the beginning of the meeting were you in the meeting at the beginning of it when it was started, the meeting of June 9?

A. I think I was right at the beginning and the meeting went into executive session almost immediately and I left.

Q. And when did you have this conversation with Mr. Essley that you have related? Did he call you back into the meeting? [44]

A. After I was called back into the meeting.

Q. Now after he called—Mr. Essley called you back into the meeting and told you they felt they had placed you in an impossible position and wanted to negotiate with you about the settlement of your contract, at that time did Mr. Essley inform you as to what the alleged illegality of your contract was? A. I don't recall that he did, no.

(Testimony of Ralph W. Held.)

Q. Did he at that time or any other member of the board charge you with any violation of your contract? A. No, sir.

Q. Or make any criticism—Mr. Essley or any other member of the board, about the way in which you had gone about starting your duties as manager under your contract? A. No, sir.

Q. Did he tell you who the members of the committee were who were going to negotiate with you about the settlement of your contract?

A. Yes, he did.

Q. Who were they?

A. Mr. Essley and Mr. Ashby and Mr. [45] Rovey.

Q. Mr. Ashby likewise is a member of the Board of Directors? A. Yes, sir.

Q. Subsequent to that did you meet with that committee for the purpose of discussing the settlement of your contract? A. Yes, sir, I did.

Q. When did you have your first meeting?

A. Well, it was immediately after the board meeting that same afternoon.

Q. And who was present at that meeting?

A. The 3 members of the committee that I have just named and myself.

Q. Did any of the members of the committee at that time accuse you of any violation of the contract or criticize the manner of your operation of the companies?

A. I don't remember whether they did specifically or not.

Testimony of Ralph W. Held.)

Q. There was a discussion about the settlement of your contract? A. Yes, there was.

Q. Was there any conclusion arrived at at that time? A. No, there was not. [46]

Q. Did they tell you at that time that you were dismissed or terminated your contract—your contract had been terminated? A. No, sir.

Q. Did you continue to perform your duties as manager thereafter?

A. Yes, sir, until June 20.

Q. And on June 20 what took place?

A. They held a second board meeting on June 20 at the close of which I was handed a statement advising me that my contract was considered at an end.

Q. Following the receipt of those formal notices of termination you left the employment and your place of employment? A. Yes, sir.

Q. What wages have you received under the terms of your contract?

A. I was paid my regular monthly salary during the period that I was there.

Q. Have you received any payments since of any kind? A. No, sir.

Q. I hand you Plaintiff's Exhibit 4 and Plaintiff's Exhibit 5 for identification and ask you [47] to state whether or not those are the notices of termination that you have testified about?

A. Yes, sir.

Mr. Trask: I offer Plaintiff's Exhibits 4 and 5 for identification in evidence.

(Testimony of Ralph W. Held.)

Mr. Laney: No objection.

(Plaintiff's Exhibits 4 and 5 received in evidence.)

Q. Mr. Held, Plaintiff's 4 in evidence is a communication from United Producers and Consumers Co-Operative, one of the defendants, is it not?

A. Yes, sir.

Q. And 5 is a similar communication from Southwest Co-Operative Wholesale?

A. Yes, sir.

Q. Mr. Held, following the receipt of these formal notices and your relinquishing of your position at the defendant corporation, how long was it before you obtained any other employment?

A. I went to work on the first day of September following that.

Q. With what concern did you go to work?

A. With the company that presently employs me, Consumers Co-Operative Services, Inc., North Kansas City, Missouri.

Q. In what capacity did you go to work [48] there? A. As general manager.

Q. Did you commence to take steps as soon as reasonably possible after your termination here to find other employment? A. Yes, sir.

Q. In this action, Mr. Held, you have stated that your damages have been computed at a sum of approximately \$25,410. How did you compute those damages?

A. Well, it was computed on the basis of a

Testimony of Ralph W. Held.)

\$10,000 annual salary for a 3-year term and 2% of the net savings of the 2 corporations for the 2 final years of that 3-year term.

Q. Now the fixed compensation therefore for the 3 years would be \$30,000? A. \$30,000.

Q. And—

A. \$16,000 for the 2% of the net during the 2 final years on which I had been given to understand that that amounted to approximately \$400,000 during 1951 which was the year previous to my coming out here.

Q. That would be \$30,000 fixed compensation and \$16,000 at 2% or a total of \$46,000 and did you make any deduction from that total of \$46,000?

A. Yes, sir. We tried to estimate what I [49] might earn in other employment and we estimated \$8,000 a year for 3 years which was \$24,000 and which we deducted from the \$46,000.

Q. You keep saying “we.” You were consulting with me at the time that you were making this computation, were you? A. Yes, sir.

Q. So you computed your damages as the result of the loss of earnings at the contract value of \$46,000 less 3 years’ employment that you anticipated you would be able to earn \$8,000 a year \$24,000, leaving a net of \$22,000? A. That is right.

Q. Mr. Held, in addition to the \$22,000 did you sustain any particular or special damages as a result of the breach of contract by these defendants?

Mr. Laney: Just a moment. May it please the Court, I object to that. There is no allegation of

(Testimony of Ralph W. Held.)

special damages of any sort, just allegation of general damages from breach of the contract.

Mr. Trask: May I rephrase the question.

Q. In addition to the \$22,000 loss of contract earnings, what other items are included in that figure of \$25,000, approximately?

A. Well, there was an item of about \$454 [50] of travel expenses, I believe.

Q. Now that was in connection with——

A. It involved 2 trips out here and back.

Q. You are not referring to the trips that the companies paid your expenses out and back?

A. No, sir.

Q. And then what other item did you have in that figure of \$25,000?

A. There was an item of \$500 moving expense and storage of furniture and so forth.

Q. What other items did you have?

Mr. Laney: Object to that. May it please the Court, move that be stricken out. That is a claim of special damages. It wouldn't be relevant damages if there were damages in that it doesn't naturally flow from the contract, no allegation of any such special damages.

The Court: You may answer.

Q. What other items went to make up the total figure that you have stated in your complaint, Mr. Held?

A. There was an item of \$21,000 which was a down payment on a house that I bought here in Phoenix.

Testimony of Ralph W. Held.)

Mr. Laney: If it please the Court, I move that that answer be stricken out on the ground [51] there is no allegation in the complaint of any such special damages and it is not damages that would naturally flow from any breach of contract, immaterial and irrelevant.

The Court: It may stand for the time being, the Court may disregard it later, I don't know.

Q. I hand you Plaintiff's Exhibit No. 6 for identification and ask you to state what that exhibit is, Mr. Held.

A. It is the escrow instructions in connection with the purchase of the house.

Mr. Trask: Offer Plaintiff's Exhibit 6. If the Court please, this offer is made to show the agreement and the down payment that was made on the home and it is offered for the purpose of showing that that down payment was lost and forfeited as a result of the breach of contract.

Mr. Laney: May it please the Court, as to Plaintiff's Exhibit 6 for identification we object to that as irrelevant to any issues in this case. In the first place it is not an element of damages but in the second place if it were it would be at most an element of special damages—claimed special damages—and the Court rules require that special damages be specifically pleaded and they are not pleaded. We [52] object to them.

The Court: May be received subject to objection.

(Plaintiff's Exhibit 6 received in evidence.)

(Testimony of Ralph W. Held.)

Q. Mr. Held, pursuant to the terms of the escrow agreement that has just been received in evidence and which you have examined, did you make a deposit of a certain sum of money in connection with the purchase of a house here? A. Yes, sir.

Mr. Laney: Would counsel and the Court pardon me. I don't want to repeat my objection but may it be understood that the same objection applies to this line of questioning.

The Court: Yes.

Q. Did you make a deposit? A. Yes, sir.

Q. How much was that? A. \$2100.

Q. What happened to that money that was deposited? A. It was forfeited.

Q. Did you receive any portion of it back?

A. No, sir. [53]

Q. I show you Plaintiff's Exhibit 7 for identification and ask you to state if that is the notice of forfeiture. A. Yes, sir.

Mr. Trask: Plaintiff offers Plaintiff's Exhibit 7. It is a notice of forfeiture pursuant to the terms of the escrow agreement.

(Plaintiff's Exhibit 7 marked for identification.)

(Plaintiff's Exhibit 7 received in evidence.)

Q. In addition to the elements that you have heretofore testified to that went to make up the total of the amount stated you were damaged were there any other elements included in that total figure, Mr. Held?

Testimony of Ralph W. Held.)

A. I think we entered an item of \$106.50 for cancellation of escrow which I found out later was covered in the \$2100.

Q. So that as far as that \$106.50 that was not an item of expense or damage to you?

A. No, it was not.

Q. Were there any other items you included in that figure at the time you made your computation?

A. Yes, I put in an item of \$250 legal expenses.

Q. That was paid to me at that time? [54]

A. Yes, sir.

Q. Have you ever paid the statement or bill from the attorneys that you employed to consult with at the time you received Mr. Essley's telegram?

A. No, I have not. They have not yet rendered their statement.

Q. You do not know what that amount might be?

A. No, I do not.

Mr. Laney: May it please the Court, I move to strike out the testimony of legal expense because it is no part of the damage and no claim that it was any special damage in the pleading. It wouldn't be relevant anyway.

The Court: It may stand for the time being. You are probably right.

Mr. Laney: I think counsel is probably right about that. At the time this was computed it was put in.

Q. Mr. Held, at the time you had your meeting

(Testimony of Ralph W. Held.)

with Mr. Wahmsley, the auditor of the company, was there any discussion of a computation of a percentage figure in addition to your fixed compensation? A. Yes. [55]

Mr. Laney: May we see which meeting he is talking about?

The Court: All right.

Q. Was there any such meeting at which there was such a discussion? A. Yes.

Q. What meeting was that?

A. At the time we had dinner at the Arizona Club which would have been March 6.

Q. You and Mr. Wahmsley were present?

A. Yes, sir.

Q. Anyone else present with you?

A. No, sir.

Q. And what was the discussion of a figure for compensation in addition to the fixed income feature of the contract?

A. I think we discussed 2% and 5% both, but we pretty well agreed that 2% would be proper since on that basis it would amount to approximately \$8,000 per year on the basis of 1951 history.

Q. And did Mr. Wahmsley at that time and you discuss a net income figure upon which the 2% would operate and discuss a tentative figure how that would come out for your contract?

A. Yes, sir.

Q. And what figure did Mr. Wahmsley give [56] you at that time if any as a net income figure upon

Testimony of Ralph W. Held.)

which the 2% or whatever per cent you agreed upon could operate?

A. Well, it was on the basis of the net savings of the 2 companies which for the previous year I understand were approximately \$400,000.

Q. When you say you understand, how did you arrive at that? How did you get that figure?

A. That was the figure that Mr. Wahmsley mentioned several times.

Q. Now you have used the expression net savings. Is that different from net income?

Mr. Laney: Object to that as calling for his legal conclusion, interpreting the contract. The contract says net income.

Mr. Trask: The contract uses the terminology net income. I am asking the witness to give an explanation of what the figures they were talking about at that time upon which the net was intended to operate and he has used a figure net savings and therefore would like to ask him to explain the meaning of the term net savings as applied to co-operative enterprises.

The Court: All right.

Mr. Laney: My objection is he is calling for an interpretation. [57]

The Court: Well, the Court is going to have to decide this some way. You will go into it.

Mr. Laney: Very well.

A. Net savings and net income are used somewhat interchangeably in co-operative terminology. Actual net income probably strictly construed would

(Testimony of Ralph W. Held.)

be the net on which a co-operative, if it is a taxable one, would pay taxes and which would be after refunds had been excluded. Net savings is normally considered to be income prior to the payment of patronage refunds.

Q. Now the figure of net, either savings or income, whatever it is, whatever the term is—that is the figure upon which you were negotiating with Mr. Wahmsley and the basis—approximately what figure based on the previous year's earnings?

A. Somewhere in the neighborhood of \$400,000.

Q. Mr. Wahmsley, did he at that time show you any of their annual reports to show how they were designated on the report itself?

A. Not at that particular meeting, no.

Q. And were you shown prior to the time that you actually signed the contract a copy of the report so that you could see how the net was indicated on the report itself whether the terminology was net savings or net income? Were you shown a copy of the annual report? [58]

A. I saw a copy of the annual audit, yes.

Q. Prior to the time you signed the contract?

A. Yes, sir.

Q. And do you recall now how that was designated on the annual audit?

A. I couldn't positively say.

The Court: We will suspend at this point until 1:30.

(Whereupon, the regular noon recess was taken.) [59]

RALPH W. HELD

sumed the stand and testified further as follows:

Direct Examination

(Continued)

y Mr. Trask:

Q. Mr. Held, what is your present compensation? A. \$8,100 per year.

Q. That is at the firm you now are employed in Kansas City? A. Yes, sir.

Q. Is that on an annual basis?

A. Yes, sir.

Q. Did anyone ever tell you on behalf of the corporation or on behalf of anyone else that Mr. Smith and Wahmsley were both required to sign our contract? A. No, sir.

Q. Did anyone either Mr. Wahmsley or any member of the Board ever object to any of the terms of your contract or suggest that any of the terms be modified or altered in any respect?

A. Not in my presence, sir.

Q. Was a copy of that contract in the files so far as you know at all times after March 22 when you [60] had your meeting with Mr. Smith?

A. As far as I know and the triplicate copy I think remained there from the date that it was drawn up which would have been March 7.

Q. Were you ever shown the minutes authorizing the matter of your employment?

A. No, sir.

Mr. Trask: I believe that is all. [61]

(Testimony of Ralph W. Held.)

Cross-Examination

By Mr. Laney:

Q. Mr. Held, your first correspondence, you say, was with Mr. C. M. Martin, the correspondence about these companies here? A. Yes, sir.

Q. And I believe with his first letter he sent you a copy of the bylaws and articles of incorporation, did he? A. I think that is right.

Q. You have that letter, or your counsel have it, that first letter, have you? A. I think so.

(Defendant's Exhibit A marked for identification.)

Q. Calling your attention to Defendant's Exhibit A for identification, that is the letter you have spoken of that was sent to you by Mr. Martin, is it?

A. Yes, sir.

Q. Now, calling your attention to the following language—"I am enclosing herewith a copy of the articles of incorporation and bylaws of our association together with a financial statement as of the close of business on October 31, 1951." Now, he did enclose a copy of the articles of incorporation [62] and the bylaws, did he? A. Yes, sir.

Q. And you have those in your possession or your attorney has—that he enclosed?

A. I have a copy of them. Whether it is the same identical copy that he enclosed I do not know.

Q. Well, it is the copy that you got from Mr. Martin, is it not?

(Testimony of Ralph W. Held.)

A. No, that particular copy was returned to him.

Q. Returned to the office or to Martin personally or where?

A. It was mailed to the company office sometime in February, I believe.

Q. Copy of what?

A. The articles and the financial statement mentioned in that letter were all returned by mail.

Q. And how about the bylaws?

A. Yes, sir, also. They were returned also.

Q. The copy of the bylaws that you now have—they are of which company?

A. Well, I have copies of both companies' bylaws.

Q. And when did you get those?

A. Those were in my desk at the office. [63]

Q. But when did you get them?

A. I don't know that I can particularly recall. I saw them there sometime in April or May.

Q. Then the letter of December 17, 1951, that was a letter signed "Southwest Cooperative Wholesale" by Martin, wasn't it?

A. Yes, sir.

Mr. Laney: I offer that in evidence.

Mr. Trask: No objection.

(Defendant's Exhibit A received in evidence.)

Q. You at that time read the bylaws, of course, that were sent you, didn't you?

A. I looked them over casually.

Q. And they were the bylaws of which company?

(Testimony of Ralph W. Held.)

A. I think it was the Southwest.

Q. Southwest Co-Operative Wholesale?

A. Yes.

(Defendant's Exhibit B marked for identification.)

Q. Calling your attention to Defendant's Exhibit B for identification, look those over and state if those are not a copy of the same bylaws that were sent to you by Mr. Martin in his letter of February 17, 1951, and it would help you I think if your counsel would hand the copy he has to [64] you.

A. Yes, Mr. Laney, they appear to be correct.

Q. So upon your memory thus being refreshed you would say that this Defendant's Exhibit B for identification is a copy of the same bylaws as that of which you received a copy from Mr. Martin in his letter of February 17, 1951?

A. They appear to be.

Mr. Laney: I will offer those in evidence.

(Defendant's Exhibit B marked for identification.)

Q. In looking over those bylaws you gained the information and before you signed this manager's agreement which is dated March 22, 1953, and which is in evidence, Plaintiff's Exhibit 1—before you signed that you knew of the provisions of Article 3 of the bylaws of Southwest Co-Operative Wholesale to the effect that the Board of Directors

Testimony of Ralph W. Held.)

shall have the following powers: "to appoint and remove at pleasure all officers, agents and employees of the corporation, prescribing their duties, fixing their compensation and requiring from them if deemed advisable security for faithful service."

You knew of that general provision there, didn't you? [65]

A. I knew of it in a general way, yes.

Q. And then you also knew of the provision in the bylaws of that company in subdivision 3 of Article 3 as follows: "That the directors shall have the power to appoint a manager who shall hold office at the pleasure and upon the terms and conditions fixed by the Board of Directors who shall exercise such powers and perform such duties as the Board of Directors shall delegate and prescribe."

You knew of that provision in the bylaws, didn't you? A. Yes.

Q. Now, before you took the employment did you also see the bylaws of the other company? Did you also see the bylaws of the United Producers and Consumers?

A. Yes, sir, I think I did.

Q. That was before you signed the contract?

A. Yes.

Q. And did you also see the Articles of Incorporation of both of the companies, each of the companies before you signed the contract?

A. If my memory serves me correctly he sent both copies to me.

(Testimony of Ralph W. Held.)

Q. That is your remembrance, is that he [66] sent the bylaws of the United Producers and Consumers Co-Operative also as well as the bylaws of the Southwest Co-Operative Wholesale?

A. I couldn't positively say, but it seems to me that he did.

Q. Calling your attention to a copy of what purports to be a copy of the bylaws of United Producers and Consumers Co-Operative, first I will ask that they be marked for identification——

(Defendant's Exhibit C marked for identification.)

Mr. Laney: If it please the Court, we can facilitate that by comparing it——

The Court: Do you avow that is a copy?

Mr. Laney: I avow it is a copy.

The Court: All right then, it can be compared later.

Mr. Laney: I will offer in evidence then, Defendant's Exhibit C for identification which I avow to the Court is a true copy of the bylaws of United Producers and Consumers which were in effect at the time of this contract and the negotiations concerning it and during all times involved in this litigation.

Mr. Trask: I have no objection subject to confirming it, I am sure it is all right.

Q. Then you knew before you entered into [67] this contract or claimed contract of the similar provisions in the bylaws of the United Producers

Testimony of Ralph W. Held.)

and Consumers Co-Operative relative to the Board of Directors having the power to hire and discharge employees and officers at their pleasure and having power to appoint a manager who should hold office during their pleasure. You were familiar with those provisions, were you not?

A. I think they also said that they might fix the tenure of office.

Q. Were you familiar with those provisions?

A. Yes.

Q. And before negotiating this contract that was entered upon, you knew that the members of the Board of Directors each were elected for terms of three years, did you not?

A. I wasn't familiar positively with their terms but I knew that they were staggered terms which was customary in co-operative boards where I had worked.

Q. Well you did read the bylaws, the articles of incorporation to the effect they were elected every 3 years, some of them?

A. I read them casually, but I didn't pay particular attention to that at the time.

Q. And you were familiar with the fact, [68] that approximately one-third of the director's terms of office would expire in about a year after you made this contract, weren't you?

A. On 3-year terms that would be an assumption.

(Testimony of Ralph W. Held.)

Q. And about a third would expire somewhat under 2 years and that all of them would be expired something like approximately a year before the end of the first 3-year term of your contract, didn't you?

A. Well, it would seem that part of them should still be serving at the end of the 3-year term.

It would seem that if they were on 3 years that a part of them would be serving at a 3-year term.

Q. Do you know when the last ones were elected?

A. No, I did not.

Q. Didn't you know they were elected sometime in the year '51—that is, in '52?

A. No, I was not aware of that.

Q. You remember, do you not, the meeting of the Board of Directors of both companies of March 6, 1953, at which there was some resolution passed about employing you?

A. No, sir. [69]

Q. What date was that? A. 1952.

Q. 1952, I beg your pardon. But you do remember a meeting of March 6, 1952?

A. Yes, sir.

Q. Now, Mr. Smith was then living, the president of the Board of Directors of each company?

A. Yes, sir.

Q. And you remember that you were present at that meeting for a time and then you and other—some other people who were not members of the Board were excused while your employment was being considered?

A. Yes, sir, that is right.

testimony of Ralph W. Held.)

Q. And you remember that Mrs. McInerney and Mr. Wahmsley were excused and were not present at the time of the actual passing of the resolution about employing you. That is true, is it not?

A. I think it is although I can't positively remember.

Q. Now, when was it that you saw Mr. Smith after the close of the meeting? Did you see him right after?

A. I think it was immediately after the close of the meeting.

Q. And then you recall that you and he [70] stepped into Mrs. McInerney's office.

A. I think I was waiting in there for the meeting to close.

Q. Well, at any rate you and Mr. Smith were present in Mrs. McInerney's office there right shortly after this meeting of March 6, 1953?

A. I think that is right.

Q. Now, you remember that Mr. Smith at that time handed Mrs. McInerney something that he said was the resolution that the Board had just passed about employing you. Do you remember that?

A. I remember he handed her something, but I didn't identify it to me.

Q. He didn't say that it was about employing you or anything about that?

A. Not that I specifically recall.

Q. And so then he did say that the Board had

(Testimony of Ralph W. Held.)

passed some resolution authorizing your employment didn't he?

A. Well, I couldn't positively say whether he did at that particular time or not. He told me sometime after the meeting broke up that they had had but whether that was the exact time that he did it I couldn't say at this time.

Q. Well, did you make any inquiry about [71] the terms of this resolution authorizing your employment?

A. No, sir, Mr. Smith merely told me that he had been authorized by the Board of Directors to employ me.

Q. Was anyone else present at that time?

A. No, that was while we were on the way uptown we were talking about it, he took me down back to the hotel.

Q. Did you ever at any time ask, before you signed this contract, to see the minutes that authorized your employment?

A. No, sir, I did not.

Q. You didn't make any inquiry about the terms of those minutes at all?

A. No, sir.

Q. You didn't make any inquiry as to what the scope of the agency of Mr. Smith was at all in the way of employing you?

A. Mr. Smith told me that he had been authorized and I had just met with the entire Board and I assumed that was the case.

Q. But you didn't make any inquiry about the terms of the authorization?

A. No, sir.

Q. You did know, though, that Mr. Smith [72]

Testimony of Ralph W. Held.)

as purporting to act as agent for the company employ you? A. Yes, sir.

Q. Then this contract was made up rather late the afternoon of the next day, March 7, was it?

A. That is right.

Q. Now, you recall that you told Mr. Smith that you intended to leave to go back to the middle-west that evening? A. That is right.

Q. And you and Mr. Smith came into Mrs. McInerney's office to dictate the contract, didn't you? A. Yes, sir.

Q. And that was at about 5:15 in the afternoon, wasn't it?

A. It was around 5:00 o'clock. I don't recall the exact time.

Q. And you knew that the office closed at about that time? A. That is right.

Q. And you stated that you had not been accustomed to have written contracts in your employment with co-operatives, is that correct?

A. That is right. [73]

Q. But you did have along some kind of a form contract document, did you?

A. I had the contract that the member companies of the Iowa Farm Service Company used for the employment of local managers. I was at that time manager of the Iowa Farm Service Company.

Q. Well, were you manager or were you director of procurement?

A. Actually I was director of procurement at

(Testimony of Ralph W. Held.)

that time. The company had been reorganized in the last year.

Q. You had been manager?

A. Yes, that is right.

Q. And did they get another manager?

A. They combined 4 companies under one general management.

Q. So they got another manager for this company? A. That is right.

Q. You were director of procurement?

A. Yes.

Q. Now, to refresh your memory, don't you recall that you produced there in the presence of Mrs. McInerney and Mr. Smith a form of contract which you said some lawyer in the east had drawn up or in the [74] middlewest?

A. I did have this contract, but I made no remark about any lawyer drawing it up. I don't know who drew it up. It was one that we had had in general use for the last 4 or 5 years.

Q. Now, to refresh your memory, don't you recall that the form of contract that you produced there was a one-page document?

A. No, sir, it is not.

Q. Well, you did dictate to Mrs. McInerney from this contract certain——

A. Certain paragraphs.

Q. Certain paragraphs and she embodied them in this contract that has now been introduced as Plaintiff's Exhibit 1? A. That is right.

Q. And isn't it a fact, please, Mr. Held, that

Testimony of Ralph W. Held.)

Q. The only thing that was changed as you dictated is to Mrs. McInerney was the names of the parties and the compensation and the percentages?

A. The paragraphs are not in the same order as they appeared in the contract from which we dictated it.

Q. Have you a copy of that contract that you produced there? [75]

A. Yes, I have.

Q. Is it in the possession of your attorney?

A. Yes, sir.

(Defendant's Exhibit D marked for identification.)

Q. Calling your attention to Defendant's D for identification, whose handwriting are those pencilled numbers, 2 number 3 and 4?

A. Those are mine.

Q. When did you put those there?

A. While Mr. Smith and I were talking about

Q. So when you assumed that Mr. Smith had the right to employ you, that was an assumption that you just gathered from what Mr. Smith told you?

A. Yes, sir, and I had just met with the entire board to talk with them about that very matter.

Q. The entire Board or any member of the board—did they at any time tell you that they could give you power absolute to hire and fire everyone there without cause, did they?

(Testimony of Ralph W. Held.)

Mr. Trask: Object to the question as argumentative. The contract speaks for itself.

Mr. Laney: I withdraw it.

Q. Did any member of the Board tell you that they were willing to make a contract for 3 [76] years including the provision that you should have the right to employ and discharge all persons needed to carry on the affairs of the business?

A. Yes, sir.

Q. The members of the Board in that meeting said that?

A. Mr. Smith told me that. When we were discussing it he agreed that that was proper to put in the contract.

Q. Mr. Smith said that, but the Board didn't tell you that, did they? A. No, sir.

Q. No member of the Board. A. No, sir.

Q. When this says that for the second and third years of the agreement your compensation should be at the rate of \$10,000 per annum plus 2% of the net income of the company, did you and Mr. Smith agree on those words?

A. Yes, sir, I think we did.

Q. You dictated that, did you?

A. But he was sitting right there and we discussed it prior to——

Q. You did dictate those words?

A. Yes. [77]

Q. Now, when you came here you started to work under this purported contract which is Plaintiff's Exhibit 1 there on April 1 of 1952?

Testimony of Ralph W. Held.)

A. Yes, sir.

Q. You knew, did you not, that the signed copy of the contract that you had signed had arrived there shortly after Mr. Smith's death?

A. No, sir, I did not know that it arrived after his death.

Q. When did you send it?

A. It was mailed, I believe, on the 22nd of March.

Q. And his death was on the 25th of March, was it not?

A. I believe that is right, but I am not sure of the exact date.

Q. Now, you mailed this to his residence in Glendale, did you not?

A. I think that is right, yes, sir.

Q. Why didn't you mail it to the company?

A. I think Mr. Smith requested that I mail it to him in the telephone conversation that we had when he called me on the morning of the 21st.

Q. Well, now after the meeting of March 6, 1952, at which the two boards of directors made the [78] resolution about employing you—after that and between that time and when Mr. Smith assigned this agreement on March 7, 1952, did you discuss the matter with Mr. Wahmsley, the auditor?

A. Yes, sir.

Q. Between those two times, between the passage of the resolution on March 6 and the signing of the contract by Mr. Smith on March 7 you didn't discuss that? A. Yes, sir, I did.

(Testimony of Ralph W. Held.)

Q. Where did you discuss it?

A. At the Arizona Club on the evening of March 6.

Q. And at the Arizona Club Mr. Wahmsley—you did not discuss with Mr. Wahmsley anything about you having power to hire and fire regardless of cause everybody in the company, did you?

A. I don't think regardless of cause, no, but I think we did discuss some such provision in the contract.

Q. That is if there was cause?

A. That is right.

Q. Then you did not discuss with Mr. Wahmsley the matter of your having a full 3 years regardless of whether you were found satisfactory, [79] did you? A. We discussed 3-year term.

Q. And the only thing was if your services were found satisfactory, wasn't it, that you discussed with Mr. Wamsley?

A. I don't think that was ever discussed at all, that particular angle of it.

Q. Mr. Wahmsley did not agree ever in your presence to the terms of this manager's agreement of Plaintiff's Exhibit 1, did he?

A. No, nor did he disagree to it.

Q. Do you know of his having any knowledge that he was delegated the job of formulating the terms of this contract with Mr. Smith? Do you know that he had any knowledge of that?

A. No, I do not.

Testimony of Ralph W. Held.)

Q. Did you ever after you came to work here on April 1 discuss with any of the members of the Board of Directors the fact that there was a contract that you claimed under that was signed by Mr. Smith alone? A. No, sir, I didn't.

Q. And did you discuss that subject with Mr. Wahmsley?

A. No, sir, I assumed that was settled when we signed the contract. [80]

Q. And then you say the first intimation that you heard that the contract was questioned or the legality of it was in that telegram that was sent to you by Mr. Essley under date of May 27, which we see is Plaintiff's Exhibit 2 in evidence.

A. Yes, sir.

Q. And Mr. Essley was the new president that had been elected after Mr. Smith had died?

A. That is right.

Q. Now, between the time when the contract was signed by Mr. Smith on March 7 of 1952 and the time of sending this wire, this telegram, Plaintiff's Exhibit 2 of May 27, between those dates did you discuss with any of the members of the Board of Directors the matter of how your contract was signed or who had signed it?

A. No, I do not recall that I did.

Q. And did you discuss with any of the members of the Board at any time prior to the time when you were notified that they considered your contract illegal in substance and any employment terminated there on June 20 of 1952?

(Testimony of Ralph W. Held.)

Mr. Trask: I don't believe I understand your question. Are you referring to the telegram or the meeting? [81]

Mr. Laney: I will reframe it.

Q. Then between the date of the telegram to you by Mr. Essley of May 27, 1952, and the date of June 20, 1952, when you were notified in substance that they considered you never legally employed and that you hadn't fulfilled the terms of the contract between those two times, did you ever discuss with any member of the Board who had signed your contract? A. Yes, sir, I did.

Q. Whom did you discuss it with?

A. Well, I discussed it with several of them. I don't know that I can name all of them particularly.

Q. And when was that?

A. I discussed it with Mr. Essley briefly when I went out to visit him at his farm following that.

Q. And that was about what date?

A. It was early in June, I don't recall the date. It was prior to June 9. I discussed it also with Mr. Knox and Mr. Fisher when I called on them following the receipt of that wire in Des Moines. I believe I also mentioned it once to Jack Fleck.

Q. But that was all in June? A. Yes.

Q. And it was after you had received a [82] notification of May 27, of course? A. Yes, sir.

Q. And Mr. Essley, when you talked with him, told you in substance that it wasn't considered that you had been legally employed because Mr. Smith wasn't authorized to make all these terms in this

Testimony of Ralph W. Held.)

contract and that he didn't refer it to Mr. Wahmsy. He told you that in substance, did he?

A. I don't remember what his conversation was, but he did mention that there was some disagreement about it and they had called a board meeting for June 9 and that they would discuss it at that time.

Q. Well, now when you first came to work there, you say, on April 1, 1952, isn't it a fact that you spent very little time around the plant or in the office, well for the entire time the entire 21½ months?

A. I was there a good share of the time, but I

Q. Well, the first week how much were you also out in the territory a great deal.

Q. Well, the first week how much were you there?

A. I think I was there all the time for the first week except when I went out to call on Mrs. Walter Smith at Glendale. I think I made that call the first week I was there to express my sympathy and I [83] went uptown a little while one afternoon to see about changing license plates on my car, but otherwise I think I was in the office all the time.

Q. The first week that you were there after you came there on April 1—well to be exact, on April 7, you went over to see members of the South-West Co-Operative Wholesale in California and elsewhere, didn't you? A. That is right.

Q. And before going there you told Mrs. McMerney, did you not, that you intended to go over and try and get their business—to have them do

(Testimony of Ralph W. Held.)

business with a company comparable to the business that was done by United Producers and Consumers?

A. I wanted to find out what the exact situation was with them since they were members of the Wholesale.

Q. And you were told that those were companies in which it was not feasible for them to buy from Southwest Co-Operative Wholesale, weren't you?

A. I wanted to know first hand whether it was feasible or not.

Q. And Mrs. McInerney explained to you why, that they could not buy any quantity more, didn't she?

A. No, I don't recall that she did. [84]

Q. Well, after you got back you admitted to her that she was correct, that there was no chance to increase that business there because they had definite other commitments or else were not in the market, didn't you?

A. I found out that that was very largely true because of the freight rates and so forth.

Q. And then you recall that the next week, that is the week of April 14, you were out of the office practically all of the time stating for part of that time that you were calling on members of the Board of Directors?

A. Yes, sir, I did call on most of the members of the Board.

Q. And you were out of the office practically all that week?

A. That is right, sir.

Testimony of Ralph W. Held.)

Q. And then by the way, before going to call see those other co-operatives why you didn't familiarize yourself with what the company here had to sell or what the price list was or the terms, anything of that sort, did you?

A. I knew what the company's business was, yes, sir.

Q. But you didn't familiarize yourself with the price list so you could quote anything to them or what you had to sell? [85]

A. I was merely making a survey to find out what the situation was with respect to their membership.

Q. I will ask you if it isn't a fact that whenever you did come to the place of business there during the month of April you would be there generally only a matter of a half hour in the morning to an hour?

Mr. Trask: May we have the time?

Q. During the entire month of April whenever you came there, isn't that true?

A. I am not sure that that time is correct and there was there very often in the evenings when the store closed because I remember being there when the door was being locked and people were being turned out of the store.

Q. Well, now isn't it a fact that there were some eight heads of departments or more in these companies? A. Something like that.

Q. And don't you know it to be a fact that during the entire time you were there that those

(Testimony of Ralph W. Held.)

heads of departments could seldom find you at all around there to confer with you?

Mr. Trask: Object to the form of the question. It is impossible for this witness to know [86] what the others could do.

The Court: Yes.

Q. Then I will ask you if it isn't a fact that from May 7 through May 23 you came there only on an average of about an hour a day in the morning to the plant or to your office?

Mr. Trask: What dates are those?

Mr. Laney: May 7 to May 23, 1952.

A. I didn't keep any calendar on that, but I know that during that period I was out of the office and we had some demonstrations in the field that I attended and we had some meetings set up that I attended. I made several trips with various members of the staff.

Q. You didn't familiarize yourself with what the business was of these various departments, did you?

A. When I was out in the field with the sales manager, for example, that is what I was doing.

Q. Then there was a Board meeting which you attended on or about May 23 of 1952, wasn't there?

A. It was somewhere along in there.

Q. And then immediately after that you left for the east, as you say, to return to your family?

A. That is right. [87]

Q. And you did not mention to the Board that you were going, did you?

(Testimony of Ralph W. Held.)

A. I had mentioned that several times to various members of the Board that the latter part of May I planned to go back after my family and that had been my understanding with Mr. Smith prior to drawing up the contract.

Q. To whom did you mention that you were going on the 23rd—that you were going at that time?

A. Well, I recall specifically that one member of the Board asked me that day—if I can think of his name. He was here a little bit ago. Emil Rovey was. He asked me that day when I was going back after my family and I told him that I planned to go that evening.

Q. And you did not mention it to the president of the company, Mr. Essley, that you were going all, did you?

A. I don't think I did that particular day.

Q. Well you didn't at all, did you?

A. I don't remember whether that had come out of previous conversations with Mr. Essley or not. I had mentioned it to several members of the Board that I [88] would plan to do that.

Q. Haven't you learned if Mr. Essley wanted to find you and couldn't find you and then shortly thereafter that, being May 22, he sent you this wire?

Mr. Trask: I object to the form of the question to what Mr. Essley could or could not do. There is no way for this witness to know.

Q. Do you recall the wire sent shortly after that?

A. I got the wire in the morning.

(Testimony of Ralph W. Held.)

Q. Then after you went east that was about May 23?

A. If that was the date of the Board meeting. I left that evening which was a Friday night, I believe.

Q. And then you returned to the office on June 2? A. On a Monday morning.

Q. That was approximately that time?

A. About that time.

Q. Isn't it a fact you spent only about an hour a day at the maximum there around the plant or at the office?

A. Well, immediately after that I contacted Dana Fisher at Blythe, California; that was an entire day's journey over there and back. I contacted Mr. Essley and Mr. Rovey the same day. Another day I was down to see Mr. Knox and I believe there was another day that [89] I stopped in to see Mr. Clek.

Q. Then you state that there was this board meeting of June 9 and after that there were certain discussions between you and a committee?

A. Yes, sir.

Q. But it did not result in any settlement?

A. No, sir.

Q. In those companies there were at the time that you were acting as manager approximately 135 employees, were there not?

A. Something like that.

Q. And to be exact there were twelve heads of departments, were there not?

Testimony of Ralph W. Held.)

A. I don't recall the exact number.

Q. Well, now this United Producers and Consumers Wholesale was doing a business of several million dollars a year, wasn't it? A. Yes, sir.

Q. One of the leading men there was Joe Huron, wasn't it?

A. He was in charge of the fertilizer plant and insecticide plant.

Q. And in charge of construction and maintenance? A. Yes, sir.

Q. And transportation in charge of keeping [90] the trucks and motor vehicles in shape?

A. I think that is right.

Q. And did you ever familiarize yourself with what he was doing?

A. I was down at the plant several times.

Q. Which plant?

A. To the insecticide plant.

Q. How many times?

A. Oh, a dozen or so.

Q. And didn't you learn that he frequently came try to find you and see you and consult with you and couldn't find you in? A. No, I did not.

Q. Well, did you ever advise with him as to what to do or find out whether he was doing it well or not?

A. Yes, I talked to him on several occasions.

Q. What did you talk about?

A. The equipment, the new equipment that he was getting in and he assured me that the material was arriving on schedule and that he would get

(Testimony of Ralph W. Held.)

the plant in production in time to start producing the insecticides for that summer's work.

Q. He was installing machinery, a lot of machinery at the insecticide plant at that time, wasn't [91] he?

A. That is what I just said, yes, sir.

Q. Well, you didn't find anything about that, did you?

A. I was not an engineer and I did attempt to try to tell him how to install it, sir.

Q. Then Everett Barber, he was manager of the lumber yard, wasn't he? A. That is right.

Q. And you didn't learn anything about the working of that or the business of that in the 21½ months you were there, did you?

A. Mr. Huber and I discussed the purchase of lumber at different times. We looked over the stock out there. I was in Mr. Basher's office two or three times during that period, but I didn't attempt to perform Mr. Basher's job for him.

Q. And you didn't attempt in any way to manage that part of the business, did you?

A. I didn't try to do his work if that is what you are referring to.

Q. You didn't attempt to manager it, did you? You didn't do anything about it, did you?

Mr. Trask: If the Court please, I object to the question. I don't know what counsel is [92] getting at about managing someone else's work.

The Court: I don't see it.

Testimony of Ralph W. Held.)

Q. Did you learn whether Everett Basher was doing a good job or a bad job or not?

A. Well, the records showed that lumber sales were increasing and I would assume from that that he was doing a good job and that was the way I attempted to manage the business.

Q. You attempted to manage it just by looking at whatever records they gave you.

A. I think that is the way it should be handled.

Q. Did you ever give him any directions of any sort?

A. Not too specifically. He had been in that job for a number of years before I came here.

Q. Mr. Bill Eden was head of the hardware department, wasn't he? A. That is right.

Q. And that was a business that did a large business, didn't it? A. Yes, sir.

Q. And you didn't look into that or become familiar with it at all, did you?

A. Yes, I knew in a general way what Mr. [93] Eden's problems were and what he was getting done.

Q. Did you ever talk with Bill Eden or ask him anything about the business or what he was doing?

A. Yes, sir.

Q. When?

A. Several times. He sat in on a couple of staff meetings that we had. I recall a couple of times that he came back and specifically asked me about a couple of tire adjustments.

Q. You recall there was one meeting at which

(Testimony of Ralph W. Held.)

Eden was present, isn't that true, and that you asked him if he had any problems?

A. As a general thing, yes, I raised that question with each one of the department heads if they had any problems that they would like to discuss.

Q. And then he told you that he had hundreds of them and you didn't make any further inquiries, isn't that right? A. No.

Mr. Trask: May we have the time and place of that meeting, Mr. Laney, please.

Mr. Laney: Well, wasn't that about the middle of May didn't that transpire, 1952?

The Witness: I don't remember, sir. [94]

Q. You knew Harvey Sims? A. Yes, sir.

Q. What was his job?

A. He operated the elevator and feed mill.

Q. He was supervisor of the feed and seed and supervisor of labor at the insecticide and fertilizer plants, wasn't he? A. That is right.

Q. And he also supervised the unloading crews and the dock men and truck drivers, didn't he?

A. That is right.

Q. Isn't it a fact that you only saw him twice in the 2½ months that you were there?

A. No, that is not true.

Q. Isn't it a fact that about the latter part of May you talked with Harvey Sims and the extent of your conversation was about 5 minutes?

A. I don't recall that conversation that you have reference to.

Q. Isn't it a fact that about that time you told

(Testimony of Ralph W. Held.)

Q. Is it the way you managed a business was just to look at the reports?

A. I don't recall that conversation, sir.

Q. And isn't it a fact that the only other time that you talked with Harvey Sims was when you talked [95] about taking one man from his department and giving that man to Mr. Holmes, the field man. Do you remember that?

A. I remember that discussion, but I talked to him at other times also.

Q. Isn't it a fact that you were there only about 10 minutes at that time?

A. I think that is probably as long as we talked about that particular man.

Q. Isn't it a fact that the only time that you met Harvey Sims was two times, once about 5 minutes and once about 10 minutes during the entire 1½ months?

A. No, I saw him around the plant many times.

Q. Did you ever try to find out from him any of the problems of the business, discuss them with him?

A. No, I didn't particularly discuss any of those things in specific detail with him.

Q. Then you know Paul Hunt?

A. Yes, sir.

Q. What was his job?

A. He was manager of the furniture store.

Q. I will ask you if it isn't a fact [96] that the only time that you went into the furniture

(Testimony of Ralph W. Held.)

store was just when you wanted to buy some furniture one time and talked about that?

A. No, that is not true.

Q. You do recall that about May 12 you came to the furniture store and introduced yourself to Mr. Hunt and inquired about your buying some furniture?

A. No, I didn't introduce myself to him on May 12. I met him the first week I was there in company with Ernie Hubert.

Q. Was it about May 12 that you talked with him about buying furniture?

A. I don't remember. I had been in the store many times before then.

Q. Isn't it a fact that you only saw Mr. Hunt, the manager of the furniture business, about twice during the 2½ months that you were there?

A. No, sir, I saw him many many times more than that, sometimes when I was in the store he was busy with a customer and I didn't interrupt or didn't talk to him, but I was through there several times.

Q. I will ask you if it isn't a fact that you never at any time made any inquiry from Paul Hunt, the manager of that department, about the business or anything about the business or the sales or [97] the management there of that business?

A. I had discussed it more in detail with Ernie Hubert since he was presented to me as being in general supervision over the furniture store and Ernie and I talked about it a great many times.

Testimony of Ralph H. Held.)

In fact Mr. Huber had discussed with me the matter of closing the furniture store and liquidating the inventory.

Q. Well as a matter of fact Paul Hunt was the head of the furniture store, wasn't he?

A. But Mr. Huber was over him.

Q. Who represented that to you?

A. Mrs. McInerney.

Q. What was Mr. Huber's job?

A. Well, the sheet that she gave me the first day I was there listed Mr. Huber as being in general supervision.

Q. Of what?

A. Of the hardware store and the furniture store, the lumber yard, those three in particular. I don't know whether that was supposed to include others or not. It didn't specifically say.

Q. Mr. Ivan Stollzfus was the office manager of the feed and seed, insecticide and fertilizer there and manager of the sales warehouse and sales office? [98]

A. That is right

Q. I will ask you isn't it a fact that you never at any time had any conference with him or did anything about the management of his department?

A. I have, and sat in on a couple of staff meetings, I believe, with the other department heads and I occasionally would ask him how things were going and he assured me that things were going all right.

Q. I will ask you if it isn't a fact that the only thing you ever discussed with Ivan Stollzfus was

(Testimony of Ralph W. Held.)

that you suggested something about grading the grounds there?

A. No, I don't think I discussed that with Ivan Stollzfus.

Q. Now, you do recall that you learned of many people coming and wanting to see you, both employees and others when you weren't there?

A. No, sir, I didn't.

Q. Well, isn't it a fact that you would frequently go away without telling anyone where you were?

A. No, I don't believe so. I think either my secretary or Mr. Huber or one of the girls on the telephone switchboard practically always knew where I [99] was going.

Q. Isn't the girl on the switchboard Wanda Shone?

A. Well, there were a great many different girls on that switchboard during the period I was there.

Q. Isn't it a fact that you would frequently leave and be gone all the rest of the day without letting her know where you were?

A. If she didn't know, Mr. Huber or Miss Alexander, my secretary, knew at that particular time.

Q. Where is Miss Alexander now?

A. I do not know, sir.

Q. You say she was your secretary?

A. Yes, sir.

Q. And you say when you would leave there you would tell her where you were going?

(Testimony of Ralph W. Held.)

A. There was usually one of those three people that knew where I was at.

Q. Now, Mr. Held, I understood you to say that you first came out here—that was in what month, please? A. April.

Q. No, I mean you first came here in what month? A. In January. [100]

Q. And I understood you to say that you determined that they had management here and you were not interested in the matter until someone called on you later from the company?

A. That is right. That is I was not definitely interested in it.

Q. Well, don't you recall that you did write to Walter Smith on February 14 of 1952, about the matter? A. Yes, sir.

(Defendant's Exhibit E marked for identification.)

Q. Calling your attention to Defendant's E for identification, this is a letter that you wrote to Mr. Smith about the date it bears? February 14, 1952?

A. Yes, sir.

Q. You do recall then that after you had gone you came back, talking with Mr. Smith about it in this letter, didn't you? A. Yes, sir.

Q. Now, when you came out here and started work, as you say, on April 1, I believe you said you attended the meeting, board meeting of April 3, 1952. did you? A. Yes, sir. [101]

(Testimony of Ralph W. Held.)

Q. And you were present during that meeting, weren't you? A. Yes, sir.

Q. And you recall that at that meeting the minutes of the meeting of March 6 in which Smith and Wahmsley were authorized to employ you and work out terms of employment were read and approved in that meeting in your presence, isn't that true?

A. I think that is right.

Q. And so you knew within three days after you had come out here to work of the fact that the authorization by the board was for Wahmsley and Smith both to work out the terms of your employment, didn't you?

A. Yes, I did and I had discussed them with both of them.

Q. And Wahmsley had never agreed to this contract at all, had he?

A. I had discussed most of the provisions of that with him, but nobody had ever said that he was expected to sign it or that anything further was necessary as far as I was concerned.

Q. Now, will you answer my question. He never had agreed to this contract that is Plaintiff's Exhibit 1 in evidence? [102]

Mr. Trask: Object to the form of the question. There is no way this witness would know unless there had been some discussion with him. He wouldn't know what was in Mr. Wahmsley's mind.

Q. You never at any time discussed the terms of that contract or showed that contract to Mr. Wahmsley, did you?

testimony of Ralph W. Held.)

A. I discussed the terms of it with him, but usually I didn't show the contract to him because Mr. Smith gave me the two copies to take back.

Q. Well, you discussed with him—did you ever discuss with him that you should have the power to hire and fire without regard to cause, anyone in the company?

A. I think we discussed that, but my assumption was that it would be with cause whenever that authority would be used.

Q. He never did agree to that, did he?

A. I don't recall whether he did or didn't.

Q. He never did agree on a percentage of this profits, did he?

Mr. Trask: Same objection. There is no way this witness would know.

Q. He never did in your presence, did he?

A. He discussed a percentage of net with Mr. [103]

Q. But he never did agree to 2% of net profits, did he?

Mr. Trask: Same objection, if the Court please.

Q. In your presence.

The Court: Did you ever discuss this matter of profit with him?

The Witness: Yes, sir, we did.

Q. Yes, but he never did agree to it nor was any percentage arrived at or even tentatively agreed between you and Wahmsley, was there?

A. I don't know whether he agreed to it or not. I did discuss it.

(Testimony of Ralph W. Held.)

Q. But it never was agreed tentatively even between you and Wahmsley?

A. He didn't disagree.

Mr. Trask: Objection.

The Court: Yes.

Q. Well, now you recall that shortly after—you say your first employment after the notification of June 20 was on September 1 of 1953?

A. That is right, sir.

Q. And I will ask you if it isn't a fact that under date of June 19, 1952—I said your first employment was June 1, 1953—that was a mistake, it was June 1, 1952, was it not? [104]

A. September 1, 1952.

Q. I am sorry, September 1, 1952. Now, isn't it a fact, though, that as early as June 19 of 1952 you had an opportunity to go back to work with the consumer co-operative association there at Kansas City?

A. Well, I believe the copy of the letter which you have photostated there was forwarded to me by Mr. Trask on the 26th of July. That was a letter that was addressed and Mr. Trask stated that the letter had been opened before being forwarded to him, but he was sending it on to me and his letter sending it to me was dated July 26.

(Defendant's Exhibit F marked for identification.)

Q. I show you Defendant's F for identification addressed to you as manager of Southwest Co-

(Testimony of Ralph W. Held.)

operative, and ask you if that isn't a photostatic copy of the letter from Consumers Co-Operative Association which was sent you at about that time?

A. Yes, sir, this letter reached me sometime after July 26.

Q. And you could have gone to work for them at that time, could you not?

A. I don't think prior to the time that I did. This is the association with which I am working actually except that I am on the payroll of one of their [105] subsidiaries.

Q. Well you went on a trip to California and found various places before you even tried to go to work, didn't you?

A. I was gone about 10 days before I got back to Iowa.

Q. You went to California, was it?

A. Yes, I went there to pick up my family.

Q. And then when did you go to Iowa?

A. About the 1st of July early part of July, I don't remember the exact date.

Q. And then July and August, during those months you could have gone to work, couldn't you, for this company?

A. That offer didn't reach me until the 26th of July.

Q. During all that time you could have gone to work for them, could you?

A. No, I called on them almost immediately to negotiate on the thing and the earliest date that

(Testimony of Ralph W. Held.)

I could have gone to work for them was September 1.

Q. You knew Mr. Harry Purdy there who was a bookkeeper and is now office manager of the company, did you? A. Yes, sir. [106]

Q. You didn't take up matters with him as the manager was accustomed to do there, did you?

A. Well, at the time I was there Mr. Purdy wasn't office manager and I did discuss the things with the man who was office manager.

Q. What did you discuss with him?

A. Various reports that I wanted on the business.

Q. And who was that? A. James Leonard.

Q. And is he there now? A. I think not.

Q. His name was James what?

A. Leonard.

Mr. Laney: That is all.

Redirect Examination

By Mr. Trask:

Q. Counsel has inquired about what your activities were from the time that you started to work in April until May 27 when you were informed by Mr. Essley that your contract was in question. During that period of time or during any of the period of time that you were in Phoenix did you ever have any other business interests of your own to serve other than getting a house for your family to live in? [107] A. No, I did not.

Q. Did you have any relatives here or personal

(Testimony of Ralph W. Held.)

Interests of any kind that would require your time away from the business? A. No, sir.

Q. Did you in fact spend any of your time during the working days other than upon company business whether it was inside the office or outside the office?

A. I spent a little time in April I would say, probably a couple or three days altogether actually negotiating the purchase of a house and I had discussed that prior with Mr. Smith and he told me that he felt that would be all right to take a little time to find a place to live out here.

Q. Other than that did you devote any of your time during the ordinary working hours to other than the affairs of the company by which you were employed? A. No, sir.

Q. Mr. Laney has suggested that you didn't spend all of your time inside the office. What were you doing when you were not inside the office?

A. Well, I can recall a couple of cotton-chopper demonstrations that I attended.

Q. How much time did they take?

A. These were a half a day each, two of them. [108] I spent two days at Casa Grande in company with Herb Holmes, who was sales manager and we called on several big growers down there and in addition to that we selected the field for one cotton-chopper demonstration that we held in that area.

On another occasion I spent two days with Herb Holmes in the Safford area. I recall meeting Mr.

(Testimony of Ralph W. Held.)

Lehigh Palmer in a cotton field one evening about 7:00 south of Mesa.

Q. Without attempting to account for every moment of your time, did you devote any time to your personal interests other than the business interest that the company had employed you to perform?

A. No, sir, I had no personal interests here.

Mr. Trask: That is all.

Recross-Examination

By Mr. Laney:

Q. Well, you went down to Yuma, didn't you?

Mr. Trask: What time?

A. We came through Yuma on our way back from Safford.

Q. You stayed in Yuma a day?

A. No, sir.

Q. There was no customer in Yuma you [109] were calling on, was there?

A. I beg your pardon, sir, I misunderstood the town. Yes, I came through Yuma on my way back from having called on the San Diego Poultry Co-op.

Q. There was no Co-op there in Yuma that was any customer at all, was there?

A. There is a Co-op there, but it wasn't a customer, but the company did have a dealer outlet there listed under the name of Grubbs Hatchery or some such name.

Q. Isn't it a fact that you went to Yuma there

Testimony of Ralph W. Held.)

and that you were endeavoring to buy a farm there? A. No, sir.

Q. You told Mrs. McInerney and Mr. Wahmsley that you were going to buy a farm there, were looking into it, didn't you?

A. I never looked into the matter at all. I came through Yuma on my way back from San Diego, but I merely passed through there.

Q. You told them you stayed there a day?

A. No, I stayed overnight.

Q. You told them you were endeavoring to buy a farm there?

A. No, I did not.

Q. Nothing to that effect? [110]

A. No, sir.

Mr. Laney: That is all.

Redirect Examination

by Mr. Trask:

Q. Were you endeavoring to buy a farm in Yuma? A. No, sir.

Q. Did you buy a farm in Yuma?

A. No, sir.

Q. Did you negotiate with anybody regarding a farm?

A. I never once talked to anybody about it except that I do recall one time Louie had mentioned there was a big area, Mr. Wahmsley mentioned there was a big area opening up down in the Yuma area, but I never investigated any further, never talked to anybody in the real estate business

(Testimony of Ralph W. Held.)

and Mr. Wahmsley was the only person that I recollect ever mentioned it to me.

Mr. Trask: That is all.

ORVILLE KNOX

called as a witness by and on behalf of Plaintiff, being first duly sworn, testified as follows:

Direct Examination

By Mr. Trask: [111]

Q. Would you state your name, please?

A. Orville Knox, Chandler.

Q. What is your occupation? A. Farmer.

Q. Between December, 1951, and January, 1952—down to after June 20 of 1952, did you hold any position with either the United Producers Consumers or the Southwest Wholesale Co-Op?

A. Yes, I was the director of the wholesale Co-Op.

Q. And were you any officer or director on the United Producers? A. No.

Q. What office did you hold, if any, with the Southwest Wholesale?

A. I was the secretary of Southwest Wholesale.

Q. That was during that entire period of time?

A. Yes, sir.

Q. How long had you been on the board of the Southwest Wholesale?

A. I don't know when I went on, but I have been on possibly eight years, something like that. I don't know the exact time I went on. [112]

Testimony of Orville Knox.)

Q. You are appearing here under subpoena from me?
A. Yes, sir.

Q. As a matter of fact weren't you one of the original incorporators of the Southwest Co-Operative Wholesale?

A. It seems to me like I went on possibly just a little bit after. I am not sure. It was in process of being incorporated. I thought maybe I was a little bit behind that.

Q. Do you have the articles of incorporation of the Southwest Co-Operative Wholesale, Mr. Laney? May I see those?

Mr. Laney: Yes. I have certified copies from the recorder's office. There are two that were in effect.

Q. Just for the purpose of refreshing your recollection, Mr. Knox, let me show you apparently a certified copy that counsel has just handed me of the original articles of incorporation of the Southwest Co-Operative Wholesale. Under Article 1, I believe, the incorporators are listed. Are you the Orville Knox that is listed there?
A. Yes, sir.

Q. Does that refresh your recollection so [113] that you now recall you were one of the incorporators and have been on the Board since that time?

A. It must be from that.

Q. And in addition to the incorporator you became a member of the Board of Directors at the same time, did you not, Mr. Knox?
A. Yes.

Q. You have been then a member of the Board of Directors of the Southwest Co-Operative Whole-

(Testimony of Orville Knox.)

sale ever since its incorporation? A. Yes, sir.

Q. That was in approximately 1944 and the other incorporators were Mr. W. L. Smith. Do you recall his name as one of the incorporators?

A. Yes, sir.

Q. That is the same W. L. Smith that Mr. Held testified to employed him and died? A. Yes.

Q. He was on the Board of Directors ever since its incorporation in 1944? A. Yes, sir.

Q. And Mr. W. S. Dorman was one of the incorporators and also on the Board continuously?

A. Yes, sir.

Q. Mr. I. F. Collier was one of the [114] incorporators and on the Board continuously?

A. Yes, sir.

Q. Mr. D. O. Essley was one of the incorporators and on the Board continuously? A. Yes.

Q. You yourself and Mr. C. M. Martin was until recently? A. Yes.

Q. So as a matter of fact although the term of the Board of Directors of that corporation is three years, practically all the directors have been on there ever since it has been organized since 1944, have they not? A. That would be right.

Q. And they have been re-elected for successive terms at all times since. Mr. Smith was only retired as a result of his death? A. Yes, sir.

Q. So there is not much change on the Board of Directors of the Southwest Co-Operative Wholesale, is there, Mr. Knox?

Testimony of Orville Knox.)

A. No, I think possibly there was one other path in there that required a new director.

Q. Other than that, the directors have been continuously re-elected for successive 3-year [115] terms? A. Yes, sir.

Q. The directors of the United Producers and Consumers, do they hold their meetings at about the same time as the Southwest Wholesale?

A. Usually immediately after the Wholesale meeting.

Q. So throughout the years you have had an opportunity to observe who the directors of the United Producers and Consumers as well as the Southwest Wholesale have been? A. Yes, sir.

Q. What is the situation with respect to United? Have their directors been substantially the same throughout the years?

A. Stayed about the same.

Q. Elected for successive 3-year terms?

A. Yes, sir.

Q. When did you first meet Mr. Knox?

A. It would be the first part of March at a meeting we had in March. I didn't meet him on my first trip here.

Q. You met him at a Board of Directors meeting of the Southwest Co-Operative? A. Yes.

Q. If the evidence shows that meeting took [116] place on or about March 6 would that be approximately the date?

A. I think that would be about right.

(Testimony of Orville Knox.)

Q. How was Mr. Held introduced to you at that time? When and where?

A. Just outside of the meeting place before the meeting. I came rather late. Just before the meeting and I was introduced by Mr. Rovey, one of our directors, as the new man that we were attempting to hire.

Q. Mr. Rovey, one of the directors introduced Mr. Held to you as the new man they were attempting to hire? A. Yes.

Q. By "we" were attempting to hire, you understood that to mean what organization?

A. Well, our two organizations, the wholesale and retail co-operatives.

Q. As a matter of fact, the Southwest Wholesale is the wholesale part of the organization and the United Producers and Consumers is the retail part of the organization? A. Yes, sir.

Q. As a matter of fact, during the years that you served on the board of the Southwest you [117] know that their policies and identities save for some difference in the board are practically the same, are they not, Mr. Knox?

A. That is right.

Q. They are related organizations and work together? A. Yes, sir.

Q. Southwest buys it wholesale and then sells to the United which is the retail outlet, is that not the way they operate? A. That is right.

Q. Did Mr. Held attend the meeting of March 6 that was the occasion of your first meeting him?

estimony of Orville Knox.)

A. Yes.

Q. At that time did the members of the Board interview Mr. Held and have conversation with him regarding generally his qualifications, history and employment status?

A. Yes, they discussed with him quite a few things.

Q. Was there any mention made during that discussion by Mr. Held as to if he accepted employment how long a term it would be? Do you recall any conversation about the length of term of employment if he would become a member of the organization? [118]

A. I don't remember discussing that with Mr. Held but we were discussing it with Mr. Smith in a special meeting.

Q. After Mr. Held—— A. Withdrew.

Q. Was excused? A. Yes.

Q. After Mr. Held's qualifications were gone into and was discussed and there was a closed meeting of the Board? A. Yes, sir.

Q. Did Mr. Smith and the Board then discuss the possibility of employing Mr. Held?

A. Yes, sir.

Mr. Laney: Object to that as it was all merged into the resolution and preliminary discussions are not relevant.

The Court: Go ahead.

Q. What was said by Mr. Smith in the closed meeting with respect to the term of Mr. Held's proposed employment?

(Testimony of Orville Knox.)

A. The thing that was discussed was that our former manager had said that it would take from 2 to 5 years for a man to get his feet on the ground in a big organization like that and we felt that [119] we certainly should give him plenty of time. Mr. Smith kept plugging for a fair length of time of 3 years.

Q. The 3-year term was discussed in the closed meeting? A. Yes, sir.

Q. Was there any objection by the members of the Board who were present at that time about the employment of Mr. Held for a 3-year term?

A. No, sir.

Q. Was there a discussion at that meeting concerning the rate of compensation to be paid to Mr. Held?

A. Yes, Mr. Smith tried to make that very clear because he was the man that was going to make the deal and a maximum of \$10,000 and we gave him liberty to go up to 5% of the net and of course he told us in there that he had too much Scotch blood in him to go out and sell the Association down the river. Of course he would try to make as hard a deal as he could with Mr. Held.

Q. Did the Board of Directors authorize at that meeting Mr. Smith to fix the compensation of Mr. Held up to \$10,000 plus 5% of the net?

A. I don't recall what the minutes said but I know that we gave him that liberty, yes. [120]

Q. Was there any discussion about giving Mr.

estimony of Orville Knox.)

Q. Did the right to supervise the employees—that is, hire and fire?

A. No, a manager wouldn't be worth anything if he didn't have that ability.

Q. Who was the previous manager?

A. Mr. Martin.

Q. Did he have the right to hire and fire?

Mr. Laney: Object to that. The record is the best evidence.

The Court: There might not be any record. Go ahead and answer.

A. Well, I know that it was brought out on one occasion that Mr. Martin said, "I can't tell you of all the times I have to turn people loose because they have sticky fingers." He said, "It is just too much of a detail to let you know." That was brought out in one of the meetings.

Q. Did Mr. Martin to the knowledge of the Board of Directors, the previous manager, hire and fire at his judgment?

A. Yes, sir.

Q. Had the Board of Directors ever objected to that type of management, that type of power?

A. No, sir. [121]

Q. Now, at this meeting March 6 at which the directors took action with respect to employing Mr. Held, was anything said by Mr. Smith to the Board as to whether or not he would or would not have complete authority to make a deal?

A. Yes, sir; that the thing that he wanted clear because he didn't want to have to come back to the board because we had been fooling around for quite

(Testimony of Orville Knox.)

a while without a manager and we knew we had to get the job done and get someone because things were getting in pretty bad shape out there.

Q. And did the Board give Mr. Smith authority to enter into a contract?

Mr. Laney: May it please the Court, the minutes of the meeting are the only way you can prove the authority.

The Court: There may not be any minutes of the meeting. They may have been written up after. They might not reflect what was said.

A. It was certainly the feeling of the Board, as I got it and certainly my feeling, that he had complete authority.

Q. Was anything said at that time at the discussion in the meeting with respect to authority to Mr. Wahmsley, the auditor, as to what part he was [122] to play in the employing of Mr. Held?

A. It was my understanding that he was to be used in considering the details which Mr. Smith wouldn't know or use as laymen wouldn't know and they would be used in offering any information that was necessary.

Q. Was there any suggestion or discussion in the meeting that unless Mr. Wahmsley signed a contract it would not bind the corporation?

A. No, nothing like that.

Q. Mr. Smith was the one who was given the authority to say yes or no as to whether a contract could be entered into with Mr. Held, is that correct?

A. Yes, that was my understanding.

Testimony of Orville Knox.)

Q. And was there action taken after Mr. Held was excused from the meeting giving Mr. Smith that authority?

A. Yes, by a resolution, I am sure.

Q. What was the next thing you heard about Mr. Held, whether or not he was or was not accepting the employment?

A. Was or was not accepting the employment?

Q. Yes. When was the next time?

A. There was a telephone call from Walter Smith immediately after having talked with Mr. Held [123] long distance and said that he would sign the contracts and mail them to him. He turned right around and phoned me because I had been very interested in getting the mess out there straightened out and getting it in the hands of a good man who could go to work and look after our interests.

Q. Mr. Smith then called you and informed you that he had communicated with Mr. Held by telephone and Mr. Held had advised him that he was signing the contract and putting it in the mail?

A. That is right, it was immediately after. It was early in the morning.

Q. When would that be with respect to Mr. Smith's death?

A. It was on a Friday morning before his death. I think it would be around the 21st, 22nd, somewhere in there.

Q. Within a very few days prior to his passing?

A. Yes, sir.

(Testimony of Orville Knox.)

Q. Was Mr. Smith at that time pleased or displeased about the acceptance by Mr. Held of his contract? A. Well, he was most elated.

Q. To your knowledge did Mr. Held report [124] for duty as the manager of the corporation thereafter? A. Yes, sir.

Q. Did you attend any meetings of the corporation thereafter at which Mr. Held was present?

A. I attended the organizational meeting. That would be as I here brought out the third of April I attended that.

Q. Was Mr. Held there? A. Yes.

Q. Was he there in his capacity as manager?

A. Yes, sir.

Q. Recognized as such by the Board?

A. So far as I know.

Q. Any objection made to him there or to the terms of his contract by any member of the Board?

A. No, we heard nothing.

Q. At any time to your knowledge either at a board meeting or any other occasion was Mr. Held ever given any express directions as to how he should go about learning the business, whether he should learn it from the inside out or outside in from his desk or outside or any particular directions given to him by the Board? A. No.

Q. Was there any instruction given to him [125] as to any particular hours that he should keep behind a desk?

A. No, I didn't hear of any at all.

Q. After the meeting of April 3 did you attend

(Testimony of Orville Knox.)

the meeting in May of the corporation or do you recall?

A. I missed the one in which he was going away.

Q. Just before he went away?

A. Yes, but we knew he was going because we asked him that before we ever hired him. He said he would leave the kids in school and he would go back in May to pick them up.

Q. Was that at the time he met with the Board?

A. Yes, sir, on the 6th of March.

Q. Was there any objection by any members of the Board at that time to that arrangement?

A. No, I heard none.

Q. How frequently were you in the office of the cooperative there, Mr. Knox?

A. After he was hired?

Q. After Mr. Held was hired.

A. Not at all.

Q. Did you ever see Mr. Held out away [126] from the office on company business?

A. He came around a few days after the first meeting and said that he had just come from Mr. Collier's attempting to meet all of the directors and find out what kind of farming they were doing and he spent some couple hours at my place. We went over the entire ranch and sat down and talked for quite a little while.

Q. Did you also talk at that time about the problems of the Co-Op and the Southwest Wholesale?

A. Yes, sir.

(Testimony of Orville Knox.)

Q. Did any of the members of the Board of Directors talk to you and advise about a telegram that was sent to Mr. Held on or about May 27 questioning the legality of his contract?

A. No, sir. I wasn't in on that at all.

Q. Was that an official meeting of the Board so far as you know?

A. I understood it wasn't.

Q. You weren't invited. You didn't attend a session at which that took place?

A. No, I wasn't notified. I understood it was being held at the Co-Op offices.

Q. How did you learn about that telegram?

A. Through Mr. Beggs who is one of our [127] directors and he told that in a regular meeting. I attempted to find out how it came about.

Q. Prior to the time the telegram May 27 was sent had there been any criticism raised about Mr. Held's employment or the manner in which he went about his duties? A. I hadn't ever heard any.

Q. When was the first meeting, to your knowledge, held by the Board of Southwest Wholesale and United at which the possible termination of Mr. Held's contract was discussed?

A. I believe that was on the 9th of June.

Q. Were you present at that meeting?

A. Yes, sir.

Q. That was a formal meeting called special meeting of the board? A. Yes, sir.

Q. Special meeting of the—of both boards at that time? A. Yes, sir.

estimony of Orville Knox.)

Q. Was there any criticism made at that time that he had violated the terms of his contract by the way in which he conducted his duties?

A. Well, the only criticism I heard was that he didn't spend enough time at the office. [128]

Q. There was criticism of that kind?

A. Yes.

Q. Do you know who made that comment?

A. Mr. Collier.

Q. Did he say he made it from his personal knowledge or from what somebody told him?

A. I think possibly from his personal knowledge.

Q. The times he had been in there?

A. Yes, sir.

Q. Was there any other criticism of Mr. Held at that meeting? A. I don't recall any.

Q. Was there any discussion at that time as to whether or not his contract had been available to the members of the Board to see?

A. No, there had been no discussion about that.

Q. To your knowledge, was the contract available for the members of the Board to examine had they wished to do so?

A. Oh, I am sure of that.

Q. Did you know a written contract had been entered into?

A. Only through Mr. Smith and the fact [129] that he said he was going to sign it but I never saw the signed contract.

Q. But you were aware of the fact that a writ-

(Testimony of Orville Knox.)

ten contract had been entered into? A. Yes.

Q. Had that been mentioned at any board meeting, to your knowledge, that Mr. Held was?

A. I can't say.

Q. There is no doubt in—there was no doubt but what Mr. Held was attending the various board meetings as the manager, was there? Was there, Mr. Knox?

A. Yes, sir, because he was asked by our president if there was anything he wanted to say as to those meetings we attended.

Q. Who was the president?

A. Mr. Essley.

Q. Did he offer suggestions or make comments from time to time?

A. Of course at the first meeting he didn't have much to say because he was new. He did make some comment, and one of the second ones, I believe, that we should figure out a finance system which would probably include doing some business with the bank for co-operatives. [130]

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. Mr. Knox, when Mr. Held was finally let go by the resolution of June 20, 1952, you were present at that meeting? A. Yes, sir.

Q. And you were the only dissenting vote in that? A. Yes, sir.

Testimony of Orville Knox.)

Q. And in the discussion in this meeting of March 7 of 1952 when the employment of Mr. Held was considered as you testified, you recall that the board did put into a resolution what was the final result of what they decided? A. Yes, sir.

Q. And you recall that at the meeting of April of 1952 the minutes including that resolution were read there in the presence of Mr. Held and were approved by the Board, weren't they?

A. Yes, sir.

Q. And you recall, do you not, that the resolution there relative to his employment on March 6 of 1952—that that was pencilled out there by Mr. Smith, wasn't it? [131]

A. I believe possibly that is the way it was handled, I am not sure.

Q. And you recall that in the discussion of the employment of Mr. Held Mrs. McInerney was not present, was she? A. No.

Q. And she was the one who normally kept the minutes of the meetings, wasn't she?

A. Yes, but this was a closed meeting.

Q. And also that Mr. Wahmsley was not there, the auditor? A. No, sir.

Q. You are familiar with the minutes and to refresh your memory, you recall, do you not, that the resolutions actually passed there was that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out the terms of employment? A. That is right.

Q. And the Board there discussed the matter of

(Testimony of Orville Knox.)

their depending upon both Mr. Smith and Mr. Wahmsley to work out the terms of the employment, didn't they?

A. There was no discussion about depending on both of them, no.

Q. Well, they did discuss that, both of [132] them were to do it? A. That is right.

Q. And Mr. Wahmsley was the auditor?

A. Yes.

Q. And Mr. Smith was a farmer, wasn't he?

A. He was president, yes, sir.

Q. But he was a farmer, that is his business?

A. Yes, sir.

Q. Well, now, did you know anything about the fact that Smith alone had worked up this contract after the resolution was passed? Did you learn about that or not?

A. I doubt whether I did or not. I just don't know.

Mr. Laney: That is all.

Redirect Examination

By Mr. Trask:

Q. To refresh your memory, isn't it a fact that 6 of the directors of the Southwest Co-operative Wholesale are now different from what they were at the time when this purported contract of April 6, 1952, was made, the contract that is in evidence as Plaintiff's Exhibit 1? Aren't 6 of them different now?

(testimony of Orville Knox.)

A. I would have to stop and figure up. I know I had some deaths that changed some of them.

The Court: We will suspend until 10:00 in the morning. [133]

ORVILLE KNOX

Assumed the stand and testified further as follows:

Recross-Examination

By Mr. Laney:

Q. Mr. Knox, in this meeting of March 6 of 1952 that you were testifying about, who were present at that meeting? What directors?

A. I doubt if I could tell you all of them. I wouldn't be sure whether some of them were sent.

Q. What ones do you remember were there?

A. Mr. Essley. Mr. Rovey. I remember there was quite a group. Mr. Ashby. Jack Click, Collier, and myself. I don't know whether there were any more or not for sure.

Q. The final agreement about employing Mr. Ralph W. Held was this resolution to authorize Mr. Smith and Mr. Wahmsley to employ him and work out the terms of the employment, wasn't it?

A. Yes, sir.

Q. Well, now, there was no motion made about what terms or what percentage or what salary, was there?

A. No, we had a working agreement just by

(Testimony of Orville Knox.)

talking the thing out because Mr. Smith, who was also present, wanted some leeway. [134]

Q. Now, you say you had a working agreement. Who agreed to it? Who agreed to anything there?

A. I would say that no one dissented. Maybe I should put it that way. There was no one that voiced any opposition to it.

Q. Did anyone say what would be the salary or the percentage?

A. Yes, we put a maximum of say \$10,000 and 5% of the net income.

Q. Now, who did that? Who said that?

A. I can't tell you.

Q. Who agreed to it?

A. I don't know that.

Q. Did Collier agree to it?

A. He didn't disagree to it. I would think that

Q. Was there anything said about that in the presence of Collier? A. Why, yes, sir.

Q. But he did not agree to it?

A. He didn't disagree to it. I would think that if a man didn't agree to it he would certainly disagree.

Q. There were many things talked about that just weren't decided, weren't there? [135]

A. Well, the man had to be told.

Mr. Laney: If the Court please, may the witness finish his answer?

The Court: Yes, go ahead.

A. The man had to be free to hire a man, that is what we were there for and we had to give Smith

(Testimony of Orville Knox.)

me latitude; we couldn't just harness him right down to bare facts or he couldn't work at all.

Q. Did anyone say that Smith and Wahmsley were to employ him for a definite period beyond the terms of the board without any escape clause at all, but if it wasn't mutually satisfactory? Did anyone say anything about that?

A. The only thing I remember is that we gave Mr. Smith the privilege to go ahead and hire Mr. Held.

Q. Now, who gave that? Who said that?

A. I couldn't tell you who said it because we were all talking. The whole thing, I suppose, came down in the form of a motion and that would be voted upon.

Q. But the motion said nothing about that, did it?

A. As to wages, no.

Q. And nothing about the term of employment, did it? [136]

A. I don't believe so.

Q. And then you say Mr. Collier didn't agree to it but he didn't say that he didn't agree?

A. Mr. Collier, all of us. There wasn't any of us that disagreed with us.

Q. Now, did Mr. Essley agree to any 3-year term?

A. Well, he didn't disagree. In conversation when you are talking about something and a fellow doesn't like it and he is one of the members he could disagree if he doesn't like it.

A. And did Mr. Ralph Ashby in any way agree

(Testimony of Orville Knox.)

that they could employ this man for 3 years without any escape clause?

A. Not in any specific words, but he didn't disagree.

Q. Well, he didn't disagree that you should refuse to employ him at all, did he? He didn't disagree to that?

A. There was no disagreement there at all. We were all just sitting there trying to work out something.

Q. Did Jack Click agree to any percentage, any maximum percentage or minimum percentage?

A. Well, Mr. Smith went out with the [137] understanding——

Q. No. Will you answer the question? Did Mr. Jack Click agree——

The Court: The answer would be the same as the others. You are wasting time here with that.

Q. Then when you passed the resolution you voted for that, didn't you? A. Yes, sir.

Q. And when that resolution was voted to leave it to Smith and Wahmsley to hire him and work out the terms of the employment, isn't it a fact that all of the terms were not known or understood there?

A. Well, they were discussed. Of course we were in a closed meeting and there were no records kept other than that motion that was made.

Q. Then you were the secretary of the meeting?

A. No, I didn't carry on any——

Q. You were the duly appointed secretary?

A. I am a secretary, yes.

(testimony of Orville Knox.)

Q. Did you make any minutes of anything other than this resolution?

A. I don't think I even made that because Walter Smith carried it on. I am sure I wasn't even asked [138] to serve as secretary.

Q. But that was the resolution. He pencilled out what you passed there. A. Yes, sir.

Q. Then coming to the meeting of June 9 you say the only criticism of Smith that you heard there from the Board members was that he didn't spend enough time at the office?

A. Mr. Held you mean?

Q. You say the only criticism that you heard of Mr. Held there was Mr. Collier's criticism that he didn't spend enough time at the office?

A. Yes, sir. I believe that is right.

Q. Well, now, what else was said by the others there in criticism of him?

A. Well, I doubt if any of them knew anything to say about him. I don't know.

Q. Isn't it a fact that Mr. Essley and others stated that they tried to see him and never could find him, that he wasn't doing any managing there?

A. They kept saying that he was being put in an impossible position and since he was in an impossible position then he just as well be fired.

Q. An impossible position in that he didn't seem to be able to do the job, was that it? [139]

A. No, sir.

The Court: What was meant by it?

(Testimony of Orville Knox.)

Q. What did they say about impossible position?

A. Well, it seemed to me like a whole trumped up affair because I knew nothing about it. They had these secret meetings and I hadn't been invited to them and this was my first knowledge of any disagreement or any believing that his contract wasn't legal so that was all new to me.

Q. Is that your complete answer? Now you say they had had these secret meetings. What secret meetings?

A. The only one I know of is the one that Mr. Biggs told me about that he had been asked to come to Mr. Wahmsley, to his office on East McDowell.

Q. That was a meeting called by Mr. Essley, the president, wasn't it?

A. Well, I suppose. I don't know. I received no notice of it.

Q. You do know that your residence was phoned about that and your relatives answered that you were on a hunting trip?

A. No, that is not right.

Q. Didn't you?

A. No, sir. I wasn't on any hunting trip. [140]

Q. You weren't? A. No, sir.

Q. You do know that you were phoned?

A. No, sir; we was not phoned.

Q. You know you weren't?

A. That is right. No one got any information about it at all.

Q. Well, now, in this meeting of June 9 in which

(testimony of Orville Knox.)

Q. Mr. Held was criticized, didn't Mr. Essley criticize him there and others?

A. Well, it seemed to be the whole thing that he couldn't be found in the office, yes, sir.

Q. It was destroying the incentive to work there, the people, the heads of departments that they got no co-operation from him?

A. No, I haven't heard that, no, sir.

Q. Now as to that meeting, at your suggestion, Pauline McInerney was excluded from it, wasn't it?

A. Yes, sir.

Q. And you were the secretary?

A. Yes, sir.

Q. And you kept minutes of it?

A. Yes, sir.

Q. And you never did produce the minutes, did you? [141]

A. No, sir.

Q. Why didn't you?

A. Because I was told to keep them in my personal files and it wasn't to fall into the hands of the help of the association.

Q. And you were told by whom?

A. By Mr. Essley.

Q. You were told to keep them in your hands, the minutes, and not give them to anyone else, not put them in the minute book?

A. That is right.

Q. Have you got the minutes now?

A. I can get them. I don't have them with me.

Q. Where are they?

A. I have them locked up in my car.

(Testimony of Orville Knox.)

Q. Will you produce them?

A. Right now?

Q. I mean during recess. A. Surely.

Mr. Laney: I think that is all.

Redirect Examination

By Mr. Trask:

Q. Mr. Knox, I believe you previously [142] testified—I will ask you again, isn't it a fact that the reason the Board authorized Mr. Wahmsley to participate with Mr. Smith was that Mr. Wahmsley could give Mr. Smith technical information regarding the amount of their earnings and the operations, is that not a fact? A. Yes.

Mr. Laney: I object to that as calling for his conclusion.

The Court: The Court has already reached the conclusion. Obviously they would have the auditor there for that purpose. The Court doesn't sit here entirely asleep.

Q. Mr. Knox, let me ask you, did you ever see Mr. Held on company business away from the office when he appeared to be exercising his duties as manager away from the office?

A. Well, on about 3 occasions, as I can remember, 2 of them with mechanical chopping demonstrations. There was a new machine that the Co-Op was attempting to sell and I believe the third one must have been a farm demonstration at the University of Arizona Experimental Farm. I know that he was

Testimony of Orville Knox.)

company with the manager of the field men at that time, Mr. Holmes. [143]

Q. So far as you know, did the Board of the Southwest, of which you were the Secretary, or any member of it, to your knowledge or in your presence, ever give him any instructions about how much money he should spend in the office?

Mr. Laney: Object to that as asked and answered already.

Mr. Trask: I asked Mr. Held that.

The Court: I don't remember. Go ahead.

A. No, sir; I know of no instructions.

Q. Is it not also a fact with respect to the by-laws of the Southwest Co-operative Wholesale Corporation of which you were secretary that they were amended from time to time by the Board of Directors?

Mr. Laney: Object to that. The record is the best evidence as to whether they did that.

The Court: It might not be material to this case anyway. A bylaw can be amended, we know that.

Mr. Trask: That is true and I want to show that as a matter of practice they were omitted by the Board of Directors and this witness was the Secretary and I think it has a material bearing, [144] Your Honor. I believe it might have on some of the new points.

A. I know that we revamped them in something like February or sometime in that year and did make a little extensive revamping of certain parts.

Q. Amending of the bylaws? A. Yes, sir.

(Testimony of Orville Knox.)

Q. That was by the Board of Directors?

A. Yes, sir.

Mr. Trask: I believe that is all.

Mr. Laney: I believe that is all.

Mr. Trask: I would like to call Mr. Lewis G. Wahmsley for cross-examination.

LEWIS G. WAHMSLEY

called for cross-examination under the statute by the plaintiff, being first duly sworn, testified as follows:

Cross-Examination

By Mr. Trask:

Q. Where do you reside, Mr. Wahmsley?

A. 3025 North 61 Street, Phoenix.

Q. What is your business?

A. Certified public accountant.

Q. You are the auditor of the two defendant corporations in this case, Mr. Wahmsley? [145]

A. I am.

Q. How long have you been such auditor?

A. Since '46.

Q. You are also designated, I believe, as assistant treasurer? A. Yes, sir.

Q. You are not a member of the—of either corporation? A. No, I am not.

Q. Or an elective official in any way of either of them? A. No.

Q. You served by appointment of the Board of Directors? A. Yes.

Testimony of Lewis G. Wahmsley.)

Q. As such, Mr. Wahmsley, you attended board meetings? A. Yes, I do.

Q. You attended the board meeting at which Mr. Essley was elected president, did you not?

A. Yes, I did.

Q. You attended the meeting of March 6 of the corporation, did you not, March 6, 1952?

A. I was there and excused, Mr. Trask.

Q. Then the next meeting after March 6 [146] was the meeting at which Mr. Essley was elected president, was it not, April 3? A. Yes.

Q. You did attend that meeting? A. Yes.

Q. And at that meeting the minutes of the previous meeting were read and approved, were they not?

A. Yes, but I don't believe I was present at that, Mr. Trask, because you see usually I came down here and had to get the financial report ready and sometimes it wasn't ready by the office in time for me to check it over before the meeting and many times I would be 15 or 20 minutes late with the meeting because I would be in checking that report before I gave it.

Q. Now, the significance of that question, Mr. Wahmsley, is that at that time the minutes were read which authorized the employment of Mr. Held as the Board of Directors as manager of the corporation—the minutes do disclose that you were present at that meeting, do they not?

A. Yes, they do.

Q. And Mrs. McInerney kept the minutes of that

(Testimony of Lewis G. Wahmsley.)

meeting? A. Yes, she did. [147]

Q. And you don't know now whether you were or were not present at the exact moment that those minutes of the previous meeting were read, is that your testimony? A. That is right.

Q. But you wouldn't say you were present, would you, Mr. Wahmsley?

A. No, I wouldn't say I wasn't but I wouldn't say I was either because I don't remember whether I was or not.

Q. You do know as a fact that the minutes of the meeting officially show you were present. you know that? A. Yes, I know that.

Q. And you did know, as a matter of fact, at that meeting, the minutes of the March 6 meeting, were read and approved which stated the resolution authorizing the method of employment of Mr. Held as manager, you know that to be a fact, do you not?

A. Well, the minutes stand on their own, Mr. Trask—say that they were and I agree to that.

Q. Mr. Wahmsley, I asked you to produce certain records of the corporation among which were the records of the annual report or audit of each of the defendant corporations for the 5 years [148] 1947 to 1952, did I not? A. Yes, you did.

Q. Do you have those records?

A. I have all except 1949 and 1950, Mr. Trask, and I don't have a typewritten copy but it is all condensed on each report there as far as the net income is concerned.

Q. As far as net income is concerned?

Testimony of Lewis G. Wahmsley.)

A. The net savings.

Q. You first used the term net income, is that a term that is generally applied to the earnings of the corporations?

A. No, it is not.

Q. Why did you use it when you first expressed your opinion as to the showing of the reports?

A. Because it does show the net income.

Q. May I see the reports, if you will, please?

A. There is the condensed right there.

Q. This is for the current year ending—

A. 1953.

Q. Do you have the 1952?

A. That audit is still in process.

Q. Do you have the reports for the previous year, 1951 and 1952?

A. Yes, I have. [149]

Q. You recall your conversations, your meeting with Mr. Held at the Arizona Club at which you discussed with him the computations of his compensation. You recall that before he was employed?

A. Well, I recall a meeting at the Westward Ho, Mr. Trask. That is where the bulk of the conversation relative to compensation took place.

Q. Irrespective of whether it occurred you did have a conversation with Mr. Held at which there was discussion as to the fixed compensation and the percentage compensation, did you not?

A. Yes, and there were many methods discussed and none was agreed on.

Mr. Laney: May we get the date of this?

Q. What was the date of the conversation at the Westward Ho?

(Testimony of Lewis G. Wahmsley.)

A. It was on the night of the 6th when Mr. Held came in. Mr. Smith and I met him out at the airport.

Q. You also had a conversation with Mr. Held, a meeting with him when you and Mr. Held had dinner at the Arizona Club? A. Yes, I did.

Q. And that was for the purpose of you [150] going over, with Mr. Held, the general technical terms of the contract of employment, was it not?

A. Not to my knowledge, it was not.

Q. Well, what did you discuss there at that time? When was this meeting at the Arizona Club?

A. On the 7th of March.

Q. In the evening, just you and Mr. Held present? A. Yes.

Q. What was the purpose of your having a dinner meeting with him at that time?

A. Mr. Smith asked me to entertain Mr. Held that night that he was tied up.

Q. So——

A. So I took him to the club for dinner.

Q. Did you understand it was just an entertainment assignment?

A. Well, to my knowledge it was.

Q. What did you discuss there? Didn't you discuss his proposed employment and the terms of it at that time?

A. No, we discussed the possibilities of the company. We discussed the Mohawk-Elton area and the possibility of the company moving into that area and developing a store over there. [151]

Testimony of Lewis G. Wahmsley.)

Q. Then let's get back to the meeting at the Westward Ho on the previous night, on that occasion you did discuss with Mr. Held the fixed compensation and the computation of the percentage compensation, did you not?

A. Yes, we did. We certainly did.

Q. And you were discussing it on the basis of the percentage, on the basis of the percentage of approximately \$400,000 of either net income or net savings that the corporation had earned during the period of the year closing 1951 which was the last complete year that was available at that time.

A. Well, we discussed if that was the net margin for that previous year.

Q. And you did discuss at that time also, did you not, Mr. Wahmsley, that in determining a percentage compensation for Mr. Held the percentage should be applied to that figure, did you not?

A. No, we did not, Mr. Trask. After all, I mean in my position I couldn't say when the records show that it varied from \$121,000 up to \$400,000. I couldn't say that it would constantly remain at \$400,000.

Q. That is right. I know that you couldn't but that was the figure to which the percentage should be applied, whether it was \$100,000 or \$400,000, whatever [152] it should be. That was the figure to which it should be applied, was it not?

A. That is what we discussed, yes.

Q. So whether it was net savings or net income or however you label it on your report, it was that

(Testimony of Lewis G. Wahmsley.)

principal figure of either net savings or net income that you were discussing to which the percentage should be applied, was it not?

A. That is right. That is what we were discussing.

(Plaintiff's Exhibit 9 marked for identification.)

(Plaintiff's Exhibit 8 marked for identification.)

Q. I will hand you now, Mr. Wahmsley, Plaintiff's 8 for identification and ask you to state for the record what that document is?

A. This is a financial statement, United Producers and Consumers for the fiscal year ending February 29, 1952.

Q. That was the last complete year prior to the time Mr. Held was employed as manager, was it not?

A. Yes, it was.

Q. Would you turn to the page on which it shows the net earnings or net savings as the case [153] may be, of the 2 corporations for that period. Do you have the page there?

A. Yes.

Mr. Trask: I offer these in evidence.

Mr. Laney: No objection.

(Plaintiff's Exhibit 8 received in evidence.)

Q. Now, referring to Plaintiff's 8 in evidence, Mr. Wahmsley, you had referred me, I believe, to an Exhibit B which shows the statement of opera-

Testimony of Lewis G. Wahmsley.)

ons and margins of the United Producers and
consumers Co-operative for the fiscal year ended
February 29, 1952, is that correct?

A. That is right.

Q. And that exhibit shows the gross business
done by your purchases by patrons, does it not?

A. Yes, it does.

Q. And it also shows the gross expense which
is charged against that volume of business?

A. That is right.

Q. Then it shows a margin which is the differ-
ence between the gross sales and the gross expense,
does it not? A. Yes, it does.

Q. What is the margin for that year [154] end-
ing February 29, 1952? A. \$389,141.85.

Q. Then does this exhibit also show the similar
figures for the year with respect to Southwest
Wholesale? A. Yes, it does.

Q. Would you refer to that?

A. Well, that, Mr. Trask, is the combined—you
have picked up revolving certificate from the South-
west.

That reflects both the United and the Southwest
because in that figure you have picked up the re-
volving certificate from the Southwest for that pe-
riod.

Q. So that actually reflects what, in ordinary
corporate practice, would be the net income or net
earnings for both corporations during that period,
is that right, Mr. Wahmsley?

A. Well, there would be a slight additional net

(Testimony of Lewis G. Wahmsley.)

margain there on the Southwest distributed to those other 4 members.

Q. And what would that amount to, that slight addition?

A. The first one, \$486. Imperial Haygrowers, \$14.74. Arizona Citrus Growers, \$169.56. [155]

Q. What is the total figure on those?

A. \$4,387.20.

Q. That figure plus \$389,000-odd figure that you have just testified to would represent the net earnings or net income or net savings for the 2 corporations for that period, would they not?

A. Yes, they would.

Q. I believe you have let me show you Plaintiff's Exhibit 9 for identification, and I ask you to state if that is the annual report for what corporation for the current fiscal period ending in 1953?

A. That is the Southwest Co-operative Wholesale, the fiscal year ending February 28, 1953.

Mr. Trask: Offer it in evidence.

(Plaintiff's Exhibit 9 received in evidence.)

Q. Showing you Exhibit 9 in evidence, as I understand it, these are the annual figures only for Southwest Wholesale? A. That is right.

Q. And what do they show with respect to net savings or net income or net earnings, however you express it, for the current fiscal year?

Mr. Laney: I object to counsel using them as synonymous net savings, net income. They [156] are different. The witness has so testified.

Testimony of Lewis G. Wahmsley.)

A. The net margin is \$194,975.68.

Q. But that is only of the Southwest Wholesale?
A. That is right.

Q. Where are the figures with respect to the United Producers and Consumers for that year?

A. Well, they are not complete yet, Mr. Trask. They will be complete, but I can tell you approximately—approximately \$40,000 more.

Q. \$40,000 more than what?

A. Than the \$194,000. From the United.

Q. Then the combined figures for the 2 corporations for the current year would be about, in round figures, approximately how much?

A. \$235,000.

Q. That represents a reduction from the figures for the last fiscal year?

A. That is from the previous fiscal year, yes.

Q. Where they were \$389,000?

A. That is right.

Q. Are your figures actually complete to the extent that you know that those are the approximately accurate figures? [157]

A. Well, I can have you the complete audit in another 10 days. I think we can have it typed up and finished by that time.

Q. In addition to those 2 figures that you have testified to about now, was there some additional figures such as you testified about to the 1952 fiscal year, an item of around \$4,000? Is there such an additional figure for the current fiscal year that you have not included in your computation?

(Testimony of Lewis G. Wahmsley.)

A. No, there is not. You see you have the full amount of Southwest here, the figures you were talking about a while ago were on the United, which takes only the revolving fund certificate from the Southwest.

Q. Then the figure that you have given me is the complete total so far as you know?

A. Yes, that is approximate. It may be \$300 one way or the other but I think that is approximately it.

Q. Do you have the reports for the years ending 1951?

A. 1951?

Q. Would you refer to your records and tell me, if you will, please, what the figures were for [158] the difference between gross business and gross expense for the combined corporations during that period? Have you got those figures?

A. You have one of the reports there. I will have to have it. United shows a net margin of \$256,715.41 and to other members of Southwest is \$9,984.78, giving combined total \$266,719.

Q. For what year is that?

A. Fiscal year ending February 28, 1951.

Q. Does that figure include the total net margin for both the Southwest and the United and other members, as you expressed it?

A. Yes, it does, Mr. Trask.

Q. Would you give us the figures for 1950 on the same basis? Is that going to take you a little time?

A. Yes.

Mr. Trask: If the Court please, may I call him

Testimony of Lewis G. Wahmsley.)

back after the recess for the purpose of giving us those figures and on now?

The Court: Yes.

Q. Mr. Wahmsley, you will be kind enough to compute those figures?

A. Yes, I will be glad to and give you a schedule on each year. [159]

Q. While you are still on the stand, there are some other questions I want to ask and particularly with respect to the figures that you have given me for the current year ending 1952-53. Were there any patronage refunds or dividends declared during the year which would affect the total that you have given me there?

A. Well, there is a refund on fertilizing insecticide which is a cash refund.

Q. In other words that would be a net margin which would otherwise have been included in the 1 to '52 figure that is not reflected in that figure, that correct?

A. Well, that is an adjustment in price, Mr. Frank, mainly for computation purposes.

Q. Let me get back to the question. That is in the '52. '52 net margin figures for the entire year, there is included a figure of the refunds on insecticides and fertilizers, was there not?

A. Yes, sir.

Q. And in '52 and '53 net margins you had taken that figure out, is that correct?

A. Well, both years reflect according to the same practice there.

(Testimony of Lewis G. Wahmsley.)

Q. Well, just answer the question. In [160] '52-'53 you had taken that figure out, had you?

A. Yes, and likewise I had taken it out in '51-'52.

Q. Well, in '52 and '52 in the \$389,000 figure, had those refunds or discounts been taken out?

A. Yes, they had.

Q. So if those discounts or refunds would be added to the '51 and '52 figure, how much would it raise that above the approximately \$389,000 figure to which you have already testified?

A. I would have to check the record to be accurate.

Q. Would you do that during the recess? I would like to have those figures for each one of the years.

A. Well, I don't know whether I can get it or not in the recess. I will have to go clear down to the office there and get it, Mr. Trask, but I think we ought to bring out to the Court here that for instance you relate \$151 a ton for competitive purposes and at the end of 60 days why you refund \$13 a ton which is a price adjustment and not considered in your margin of operation.

Q. That same method of doing business is the co-operative method of doing business [161] throughout, is it not, Mr. Wahmsley?

A. That is right.

Q. And you do that through all of your operations and those are your totals that are reflected by your net margin, is it not, is that not a fact?

A. No, it is not a fact.

Q. Isn't it a fact that your method of doing

Testimony of Lewis G. Wahmsley.)

business, your operation, is that you charge on a current competitive level and then your margin of profit you discount or give back to your members of your consumers and that is the dividend or the benefit they derive from operating as a co-operative operation, is that not a fact?

A. Well, there is 2 types. In other words there is a cash refund for adjustment in price to our ordinary required margin, and then there is the revolving fund certificate issued at the end of the year out of the margin which we set up as a standard that we want to be governed by.

Q. In both instances, Mr. Wahmsley, your retail outlet sells to a consumer at a competitive price and then there is a refund to the consumer in the form of a dividend or a rebate or whatever you call that creates the advantage to which he is entitled as a member of the Co-Op whether it is by [162] cash or credit at the end of the year, is that not a fact?

A. That is right.

Q. And if you would figure your cash discount the same as the refund on the other merchandise that you sell only you handle it in a little bit different manner, is that not a fact?

A. No, because on fertilizer insecticide they get their revolving fund certificate based on their net purchases there just like they do on every other item.

Q. But insofar as this particular item of insecticide and fertilizer that isn't reflected in these net margin figures, it is a charge that is made to the

(Testimony of Lewis G. Wahmsley.)

consumer at a competitive price and then a cash refund to the consumer to show the advantage he gets by being a member of the Co-Op, is that not a fact? That is the way it is handled, is that not a fact?

A. Well, that is true but the reason that the price at the time of this cash refund is set at that price is due to your source of supply.

Q. Irrespective of the reason for it, in either event, in the revolving fund certificates or however you call them which are returned to the consumers at the end of the year and the cash refund [163] on the insecticides, the difference between the sales price which is originally charged and your cost of operation, is your margin, as you call it, between gross sales and cost, is that not a fact?

A. That is right.

Q. And by excluding from the year 1952 and from the year 1953 your cash refunds, you have excluded a figure which would ordinarily be reflected in the net margin, have you not? A. No.

Q. Let me go on to something else. I think I have in general what you have in mind.

I asked you also to produce for me, Mr. Wahmsley, the monthly comparison figures for the months during which Mr. Held was there to show the comparative figures for those months he was there and the months in the previous year. Have you produced those figures? A. I have.

(Plaintiff's Exhibit 10 marked for identification.)

Testimony of Lewis G. Wahmsley.)

Q. Showing you Plaintiff's 10 for identification, the papers that are fastened under this fastener, the top paper which is headed, "Monthly Report at a glance, Month of February, 1953"—those [164] over the monthly reports of your operations during the period Mr. Held was there and for the year previous, do they not? A. Yes, they do.

Mr. Trask: Offer them in evidence.

Mr. Laney: May I ask one or two questions on voir dire?

Q. (By Mr. Laney): Is all of this just confined to a showing of comparison between the months when Mr. Held was there and the like months of the previous year or is there other additional data in this?

A. That is a complete file, Mr. Laney, month by month since March 1, 1950.

Q. And all of this is necessary to show what that comparison is, is it?

A. Well, I don't think that that is necessary. I mean you can take the sales analysis there which will show the sales for the current year and the previous year in the same month and operating expenses likewise.

Q. I notice some looseleaf in these. Are these part of that?

A. No, those are other work papers.

Q. Are they part of this? [165] A. No.

Mr. Laney: I would think, may it please the court, this man can summarize the data and give

(Testimony of Lewis G. Wahmsley.)

it. It seems there is a lot of stuff other than what is needed here.

The Court: Yes.

Q. (By Mr. Trask): Mr. Wahmsley, would you please at the recess segregate from those or make notes so that you can testify from them as to the gross business done for the months of April, May, and June and July of 1952, those being the months that Mr. Held was at the United Producers and Consumers and the Southwest as manager and the gross sales figures for the same months in the previous year, the 1951 gross sales figures. Are those figures all contained in the exhibit which has just been handed to you? A. Yes, they are.

Q. Can you give it to us quickly right now?

The Court: We will have a recess.

(A brief recess was taken.)

Q. Have you had time to give us the computation on the total net margin for the two corporations for the years 1950 and 1951?

A. No, I was compiling the information [166] on the gross patronage during the 4 months you asked for.

Q. You haven't made the other computation?

A. No, I have not.

Q. Then on the gross business done during the months of April, May, June and July of 1951 as compared to April, May, June and July of 1952, what do those figures show on a comparative basis?

(Testimony of Lewis G. Wahmsley.)

Q. Have you written those out, copied them from the record?
A. Yes, I have.

(Plaintiff's Exhibit 11 marked for identification.)

Q. Showing you Plaintiff's 11 for identification—that is the comparative schedule that I have asked you to prepare during the recess and which you have prepared from the books of the corporation records.

A. Yes, there is one addition there, Mr. Trask. I put March on there in addition to the months you asked for.

Mr. Trask: Offered in evidence.

Mr. Laney: There is no objection.

(Plaintiff's Exhibit 11 received in evidence.)

Q. Then showing you Plaintiff's 11 in evidence, Mr. Wahmsley, it shows that for April, 1951, as compared to April of 1952 there was an increase in gross [167] business, does it not?

A. Yes, it does.

Q. And for May there was an increase in gross business?
A. Yes, there was.

Q. In June of 1951 as compared to June of 1952 there was a decline of less than \$1,000 on a total of around \$279,000?
A. That is right.

Q. And for July there was a decline of around \$3,000 out of a total of \$434,000, is that correct?

A. That is right.

(Testimony of Lewis G. Wahmsley.)

Q. And the Southwest Co-op figures on a comparative basis are about the same ratio?

A. Well, you see your United Producers are your biggest customer in the Southwest so naturally as United Sales go up, Southwest automatically increase.

Q. They both operate in the same ratio. Mr. Wahmsley, you knew at the time of your meetings with Mr. Held beginning in Chicago and on through until he began his employment, you knew that he was being negotiated with for a contract to act as manager, did you not?

A. Well, the first meeting, Mr. Trask, I think, was mainly interested in finding out if Mr. [168] Held had someone he could recommend. After that point I think negotiations were with Mr. Held because at that first meeting why he made it plain that he would be interested in looking the situation over.

Q. And when he came out here on his first trip at which time he stated that he was not interested and went back you knew that he was being negotiated with then for a position as manager, did you not?

A. Well, he was invited out to look over the situation and see if he could be interested in the position.

Q. As manager? A. That is right.

Q. And when he came back the second time you knew that he came back for the purpose of being

Testimony of Lewis G. Wahmsley.)

interviewed to see whether the corporation could employ him as manager, did you not?

A. That is right.

Q. And when he met on the various occasions with the Board of Directors and with you and with Mr. Smith, separately and together, you knew that you were negotiating with him on the basis of contract as manager, did you not? A. Yes, I did.

Q. And he said on several occasions to you and to Mr. Smith in your presence that he would come out [169] here only on a 3-year term, did he not?

A. I don't remember that, Mr. Trask.

Q. Don't you, as a matter of fact, remember the discussion of a 3-year term? A. No, I do not.

Q. Do you not remember ever discussing a 3-year term?

A. No, I do not. We discussed several terms.

Q. What terms did you discuss?

A. Well, we discussed the first year if services were satisfactory then it should be on a basis—in continuing basis, but I don't believe that we ever came to any firm understanding as to the term of the contract.

Q. Well, I am not asking you as to the exact term of the contract but you discussed a 3-year term of the contract, did you not?

A. We discussed—yes, 3 years and 5 years.

Q. That is right, and you also discussed a \$10,000 annual salary, did you not—fixed salary?

A. Yes, we did; we discussed a \$10,000 salary. We discussed an \$8,000 salary, too.

(Testimony of Lewis G. Wahmsley.)

Q. And you discussed a percentage of the net, did you not?

A. Of the net margin, yes, we did. [170] Likewise that was discussed from 2% to 5%.

Q. When did you first learn the written contract had been entered into?

A. Sometime in March.

Q. Before Mr. Held came here to begin his employment? A. I believe so, Mr. Trask.

Q. As a matter of fact, didn't you learn about it, didn't you know that a copy of the contract was in the files of the corporations at all times after March 7 when Mr. Smith signed it on behalf of the corporation?

A. Not at all times but I knew after that period there was a copy in the files.

Q. And you had read it, had you not, before Mr. Held came here to work for the company?

A. Yes, I have read it.

Q. And did you ever make any objection to the terms of it to any members of the corporation?

A. I am not a lawyer, Mr. Trask, I am a public accountant. I did not have knowledge of the fact that I was authorized to negotiate that contract there. I could not take exception to what the president had done.

Q. You never made any objection to it? [171]

A. No, I didn't.

Q. In any way?

A. I had no basis and no authority to take exception to it.

Testimony of Lewis G. Wahmsley.)

Q. Now, did I understand you to say in your meeting with Mr. Held at the Arizona Club you didn't discuss the terms of employment, that was simply a social visit?

A. We discussed the possibilities of the company and I would say possibly something in the way of employment and compensation came up but that was not the main topic of conversation.

Q. Well, let me call to your attention, do you recall when your deposition was taken in this matter? A. Yes, I do.

Q. And I asked you—let me ask you if these questions were not asked and these answers made, beginning at Page 18 of the deposition:

“Q. Do you recall a meeting with Mr. Held at the Arizona Club? A. Yes, I do.

“Q. When was that?

“A. I don't remember the exact date but it was in the neighborhood of this period early in [172] March.

“Q. Who was present at that?

“A. Mr. Smith, no just Mr. Held and myself, I believe.

“Q. Did you and Mr. Held at that time have any discussion with respect to the terms of employment? A. Yes, we discussed it.

“Q. Did you discuss compensation at that time?

“A. Yes, we did.

“Q. Did you discuss his official duties?

“A. Not to any great degree, Mr. Trask.

“Q. Did you discuss at that time whether or not

(Testimony of Lewis G. Wahmsley.)

he would have the right to employ and discharge other employees?

“A. Well, we discussed it to this extent, that I made the opinion that for a manager he should have the right to handle his employees and that he should have the right to hire and fire with cause.”

Q. Those questions were asked you at the time of the deposition and those answers were given?

A. Yes, that is right.

Q. Now, with your memory thus refreshed, do you now recall that you did discuss the terms of employment [173] to that extent at your meeting with Mr. Held?

A. I would say yes, Mr. Trask, but I still contend that the basis of our conversation at that meeting was not his employment, it was based on what the company could do and the possibilities of the company, it was not entirely on the employment angle.

Q. Actually you have never had any substantial objection to the contract even as it exists at the present time, have you, Mr. Wahmsley?

A. Yes, I have.

Q. What was that objection?

A. Because there is no basis of termination or no escape clause for either party in there.

Q. And what clause do you think should be there?

A. Well, it should provide for some termination if not satisfactory, the services of the employee;

Testimony of Lewis G. Wahmsley.)

Q. Likewise if he is not satisfied with the company he would not be held.

Q. In other words, it should be a contract for 3 years terminable by either party if the services are not satisfactory, is that your interpretation of what you would like to have?

A. Specified notice of termination with the means in which it could be terminated and the damages [174] to either party.

Q. And damages to either party?

A. That is right.

Q. Oh, I see. Just a contract for 3 years terminable if either party is not satisfied wouldn't be much of a contract would it, Mr. Wahmsley?

A. Well, if you will take the contract of Mr. Held, that Mr. Held dictated his contract from——

Q. Just answer my question, please. If you have a contract for 3 years——

Mr. Laney: I think he is answering it.

Q. It would be terminable upon dissatisfaction by either party—that wouldn't be much of a contract whether for the corporation to rely upon or for the individual to rely upon, would it, Mr. Wahmsley?

A. That is a normal contract of employment, Mr. Trask.

Q. So neither the employee nor corporation would know from day to day or hour to hour whether the employee had a job or the company had an employee?

A. If their services were satisfactory they wouldn't have to be concerned about that.

(Testimony of Lewis G. Wahmsley.)

Mr. Trask: I believe that is all. [175]

Direct Examination

By Mr. Laney:

Q. Mr. Wahmsley, these figures that you gave, the approximately \$400,000 and then I take it for the year ending in February of 1952—what do you call that? Do you call that margin or what?

A. Net margin, yes.

Q. Well, now, counsel has used with you apparently interchangeably the term net income. In the books and records of the company in the parlance of co-operatives are those 2 the same?

A. No, they are not. The net income is the amount that you report for tax purposes.

Q. And that comes from what?

A. From the non-member business. The remaining net margin is distributed to the members in proportion to their purchases.

Q. And then this margin, I will ask you whether the company is under contract, that the members are simply advancing that money to the company for its use?

Mr. Trask: I object. It calls for a legal conclusion. It may be determined by the bylaws, the articles, but not by this witness, I submit, if the Court please.

Q. Well, are you familiar with the bylaws [176] in that respect?

A. Yes, I am familiar with the bylaws and I

testimony of Lewis G. Wahmsley.)

also familiar with the contractual obligation that they make at the beginning of each year for their purposes. I advise that they make the contract at the first board meeting.

Q. And in substance what do they agree to?

Mr. Trask: If the Court please, I believe the contract is the best evidence.

The Court: I think so.

Q. I call your attention to the minute book of the United Producers and Consumers Co-operative and particularly to the minutes of the meeting of February 21 of 1952 and I will ask you to state whether you are familiar with and know those to be the minutes and especially the resolution appertaining to what we are talking about? A. Yes, it is.

Q. Now, I will ask you to read that resolution as it appears on the record.

A. Upon a motion of Mr. Collier duly seconded by Mr. Essley, the following resolution of the Board of Directors was unanimously adopted: Be it resolved that a record of business done with patrons from and after [177] March 1, 1952, shall be maintained and at the close of this association's fiscal year the net savings for the year shall be credited to the patrons on the books of this Association in proportion to their patronage. Such credit shall represent the liabilities of this corporation as of the close of the fiscal year and be subject to the provisions of Article 19 of the Bylaws of this Association providing for a revolving fund as therein provided.

(Testimony of Lewis G. Wahmsley.)

Q. And I will ask you whether that same resolution has been passed since then in 1953?

A. Yes, it has.

Q. And was it before that in 1951?

A. Yes, for tax purposes that is a very controlling factor. The contract has to be made at the beginning of the year.

Q. Now, opposing counsel in their subpoena directed you in addition to what they talked about—any income tax returns or information returns filed by the United Producers and Consumers Co-Operative and the Southwest filed were either State of Arizona, or U. S. for the years 1948 to 1952, inclusive. Now as a sample how about that filed for 1952? Is that the last you have? [178]

A. Well, the last I have on Southwest is February 28, 1953, which would be the 1952 fiscal year.

Q. And have you that here? A. Yes, sir.

Q. Does that in any place speak of the income—net income? A. Yes, it shows net income.

Q. And was there any net income as to Southwest Co-operative Wholesale?

A. No, there was not.

Q. And then have you the tax return for the year 1952 of the United Producers and Consumers Co-operative?

A. That has not been filed. I have the one for the fiscal year 1951 which was February 29, 1952.

Q. Does that speak of the net income?

A. Yes, it does.

Q. And what was the amount of the net income

Testimony of Lewis G. Wahmsley.)

or that year, that was the year 1951—what was the amount of the net income? A. \$21,760.60.

Q. And you say you haven't worked it up for the year 1952 for that company?

A. No, we don't file a tax return until the audit completed. [179]

Q. Now counsel asked you about the meeting when you took Mr. Held to dinner at the Arizona Club. Now when was that with respect to the time that you now have learned Mr. Held and Mr. Smith had signed this contract? A. That was—

Q. Well before or after?

A. It would have been before, Mr. Laney.

Q. Then on what date was that if it was in the evening? Just search your memory and find out.

A. Well, I am not sure. They testified it was on March 7 and I was just assuming it was but it might have been on the 6th, as I stated in my first testimony.

Q. Assuming that the contract was signed by Mr. Smith at something like 5:30 on March 7, was this meeting before or after that?

A. Well, it was the day before, Mr. Laney, because I didn't see Mr. Held after that contract was signed. He left immediately on the plane.

Q. I will ask you whether at that meeting you and Mr. Held ever came to any agreement in your own minds as to the terms of the contract and the length of it? A. No, we did not.

Q. And did he and Mr. Smith ever at any [180] time in your presence, say at the meeting at the

(Testimony of Lewis G. Wahmsley.)

Westward Ho some time a little before that—come to any agreement on the terms of the contract?

A. No, sir.

Q. As you have now learned, Mr. Smith had signed this contract, Plaintiff's Exhibit 1, and given the 2 signed copies to Mr. Held. Now in that, before that and from the time of the meeting of March 6, when the resolution was passed authorizing the employment of Held, from that time until that contract was signed I will ask you whether you were available so that they could have consulted you if they wanted to? A. Yes, I was.

Q. And did they consult you at all?

A. No, they did not.

Q. Did you ever at any time agree with Held or with anyone else to the terms of that contract which is Plaintiff's Exhibit 1?

A. No, I did not.

Q. Now, when you say you saw that contract—early in April, I believe you first saw it, you said?

A. No, I saw it, Mr. Laney, in March [181]

Q. Now, you saw that about when? [181]

A. Oh, I would say around the 9th or 10th, 11th of March.

Q. Now, at that time did you have any knowledge that you had been delegated the authority or the duty to negotiate that or pass on it?

A. No, I did not.

Q. If they had consulted you would you have

Testimony of Lewis G. Wahmsley.)

agreed to a 3-year contract without any escape clause? A. No, I would not.

Mr. Trask: Calls for speculation.

Q. In asking you about why you objected, you started to answer about what Mr. Held—the sample contract that he produced here that he said was what he had along with him and dictated from, Plaintiff's D for identification—I will ask that be marked in evidence, it was for identification.

(Defendant's Exhibit D received in evidence.)

Q. Concerning what you were about to answer about the escape clause, I will ask you to state whether or not something of that sort is embodied in Section 11 of that contract?

Mr. Trask: The exhibit is the best evidence as to what it contains.

Mr. Laney: Defendant's counsel was asking what he objected to and if he thought any contract [182] might be——

The Court: I know, but I believe this is wasting the Court's time.

Mr. Laney: Very well.

Q. Now, when counsel brought out from you that there was no escape clause in that contract; when did you first raise that point? He asked you if you ever objected?

A. On the meeting of May 27 when I read the contract to that informal meeting of the Board of Directors, I pointed out at that time that there was no provision for cancellation on either part and that

(Testimony of Lewis G. Wahmsley.)

I did not think that anyone should enter into a contract where there is no provision for either party to get out. It works to the disadvantage of——

Mr. Trask: Object to the witness continuing a voluntary answer that is non-responsive. Move it be stricken.

The Court: It may be.

Q. Now, opposing counsel got you to compute certain figures from your report on a yellow sheet of paper which showed that during April and May there was some increase in the business of both companies in the year 1952, over and above that in the year 1951. I will ask you to state whether this was that same trend [183] in March before Mr. Held came here. Is that true or not?

A. Yes, that is true.

Q. Well now, what figures was for March of 1951? A. \$289,176.76.

Q. What for the year 1952?

A. \$305,798.59.

Q. Do you know why there was that trend?

Mr. Trask: I object. It calls for an opinion and conclusion.

Mr. Laney: What was the condition as regards cotton?

The Court: That doesn't make any difference.

Mr. Laney: That is all.

Mr. Trask: I have no further questions of the witness except that I would like to have the figures that I have previously asked the witness for. That is, the net margins for the years 1950 and 1951 and

(Testimony of Lewis G. Wahmsley.)

would like to have the figures for the net margins on sales of insecticides about which the witness has testified were not included in the net annual figures because they were considered cash discounts rather than customer discounts and subject to getting those figures [184] I would like to discuss them with the witness.

The Court: All right.

The Witness: May I ask if you want that for all 4 years, do you not?

Mr. Trask: Yes, I would like to have the net margin figures for the years 1950 and 1951. I believe you have given it for 1952 and '53. And also I would like to have the figures of the net margins on the cash discounts on the insecticides concerning which you testified for all 4 years.

The Witness: For all 4 years?

Mr. Trask: Yes. Subject to that testimony, if your Honor please, the plaintiff is about ready to rest. Before the plaintiff rests, the plaintiff moves the Court for an order granting a trial amendment to the method of stating the damages although counsel feels the complaint is sufficient lest there be any objection as indicated by counsel for the defendant, the plaintiff before resting, moves to amend the prayer of the complaint and the paragraph alleging damages to conform to the evidence to show that the plaintiff prays for damages for loss of benefits under the contract in the sum of approximately \$22,000 and for special damages for travel and expense of travel at \$454, for moving expense

(Testimony of Lewis G. Wahmsley.)

\$500, and for damages for forfeiture of [185] the contract on the purchase of a house in the sum of \$2100.

Mr. Laney: May it please the Court, the defense objects to that, under Rule 9 of the Rules provides that when the items of special damages are claimed, they shall be specifically stated.

(Argument to the Court.)

The Court: Motion is granted.

Mr. Trask: The plaintiff rests.

D. O. ESSLEY

a witness called by and on behalf of the Defendant, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your business? A. Farmer.

Q. I will ask you whether you are connected with the United Producers and Consumers Co-operative and Southwest Co-operative Wholesale?

A. I am.

Q. And in what capacity?

A. Presently that of president.

Q. President of each company? A. Yes.

Q. And a member of the Board of [186] Directors? A. That is right.

Q. Who was the president just before you?

A. Walter L. Smith.

Testimony of D. O. Essley.)

Q. Is Mr. Smith living or dead?

A. He is not living.

Q. Do you recall at this time the date when he died?

A. I believe it was the 25th of March.

Q. 1952? A. 1952, yes.

Q. I will ask you whether you were present at the board meeting, Board of Directors of the 2 companies, that was held on March 6, of 1952. That has been mentioned here, the meeting in which there was some resolution about employment of Mr. Held. Were you present at that time?

A. Yes, I was there.

Q. And at that time was Mr. Smith president of the corporations? A. Yes.

Q. And were you a board member?

A. Yes.

Q. Of each? A. Yes.

Q. Now I call your attention to the [187] resolution that has been shown in evidence here stating that Mr. Smith and Mr. Wahmsley are authorized to employ Mr. Held as general manager and work out the terms of his employment. Do you recall whether that resolution was passed at that meeting?

A. Yes, it was.

Q. And I will ask you whether there was any other resolution about the employment of Mr. Held other than that passed at that meeting?

A. I believe not.

Q. I will ask you whether the Board of Directors came to any agreement about the employment

(Testimony of D. O. Essley.)

of Mr. Held other than expressed in that resolution.

A. I think there may have been some discussion relative to the compensation only.

Q. But you did agree on it or anybody agree on it?

A. They were not bound to any particular figure that I remember of.

Mr. Trask: I object to the witness' answer that they were not bound as not responsive.

The Court: I don't know who he means by they.

Q. Did you agree to any term of employment for Mr. Held there at that meeting? [188]

A. No.

Q. And did you agree to any employment of him in any way contrary to the bylaws?

A. I don't think so.

Q. And then when you authorized Mr. Smith and Mr. Wahmsley to employ him and work out the terms of the employment, did you in any way agree or bind them as to what the terms of the employment should be?

Mr. Trask: Just a minute. Object to counsel's question. All of them are leading and suggestive.

The Court: Every one.

Q. Did you state or agree that Mr. Smith and Mr. Wahmsley could make a contract for three years?

Mr. Trask: Same objection.

The Court: Same ruling. This witness was present. Let's have him tell us what was talked about there.

Testimony of D. O. Essley.)

Q. Will you go ahead and tell us what your best remembrance is of how it came up and how you delegated this to Smith and Wahmsley.

A. I think we had some discussion regarding compensation. That is all I remember of, but no specific figures were set.

Q. Why did you delegate it to Smith and Wahmsley? [189]

A. Because we thought they could deal with him better than the whole board. The whole board wouldn't get together and deal with him very well. It was easier done to have a couple of men go and talk with him.

Q. After Mr. Smith's death, when were you elected as president of the two companies?

A. I believe about April 3.

Q. When did you first see a copy of this contract which is in evidence as Plaintiff's Exhibit 1?

A. I don't remember the date. It was a little time after that that I had seen a copy of that.

Q. Well at that time did you have any knowledge that they had not consulted Mr. Wahmsley about it? A. No, I did not.

Q. When was it you first discovered that Smith and Held hadn't consulted Wahmsley about this?

A. I don't remember the date. It was some little time after that, however.

Q. Do you remember the directors meeting that they termed an informal meeting which was held March 27, 1952? Do you remember the informal

(Testimony of D. O. Essley.)

meeting that was held on May 27, 1952, what they called an informal meeting? [190]

A. Yes, I do.

Q. Who called that meeting?

A. I think that I was responsible for that meeting.

Q. And I will ask you whether, if you know, Mr. Knox's home was phoned about it to give notice of it?

A. I couldn't say, of course. I understood it was, but I don't know.

Mr. Trask: May the answer be stricken?

The Court: It may be.

Q. Did you direct——

The Court: It wouldn't make any difference.

Q. When with respect to that meeting was it that you first discovered that Mr. Wahmsley hadn't been consulted in the formulation of this contract?

A. Well, I think along about that time I had learned something about that.

Q. Well, now after you were elected as president of the Board there as you say, about April 3, were you able to find from then on to what extent were you able to find Mr. Held there on the job?

A. Well, I didn't see him very many times, [191] maybe two or three times during the time he was there.

Q. And how often would you be there?

A. Something like——

Q. How many times a week?

A. Two or three times a week.

testimony of D. O. Essley.)

Q. And then when he left for the east, as he did, about May 25, I will ask you whether he notified you that he was going out of town?

A. No, I didn't know about that.

Q. And did you try to see him right the next day?

A. I think it was the next day I was in there.

The Court: Did you know he was out of town?

The Witness: No, I didn't know.

The Court: All right. We will suspend until 1:00 o'clock.

(Whereupon, the regular noon recess was taken.) [192]

D. O. ESSLEY

Assumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Laney:

Q. Now, Mr. Essley, you heard the testimony of Mr. Knox to the effect that at this board meeting of March 6, 1952, Mr. Held stated that he would consider the job as manager on an unconditional 3-year term. Did you hear any such statement made at that time? A. No, I did not.

Q. You heard the testimony of Mr. Knox to the effect that they agreed there at the board meeting that Smith and Wahmsley could employ him for a period anything up to well, a period of three years

(Testimony of D. O. Essley.)

in any percentage up to 5%. Did you hear any such agreement at all?

A. I didn't quite get your question.

Q. You heard the testimony of Mr. Knox to the effect that at this particular board meeting, March 6, 1952, it was agreed by the board members that Mr. Held would be employed for three years. Was there any such agreement?

Mr. Trask: Object to the form of [193] the question. I don't believe that is the testimony. He repeatedly asked if he agreed and he said they didn't disagree. I think that was the testimony all the way through.

Q. Was it in any way stated that that was to be the term of employment there?

A. I think not.

Q. Was it in any way stated there that anything up to 5% of the net would be agreeable?

Mr. Trask: Object to the question as leading.

Mr. Laney: We are proving a negative, if it please the Court. We are asking him if that was said.

The Court: He was there. He ought to be able to tell it.

Mr. Laney: Now, we are proving what wasn't said.

The Court: Well all right, go ahead. Was it discussed, this matter of percentage, between you?

The Witness: Yes.

The Court: What was said about it?

The Witness: Well nothing definite.

Testimony of D. O. Essley.)

The Court: I know, but what was said? [194] What is your conclusion, whether it was definite or not, tell us what was said about it.

The Witness: I think that something was said about \$8,000 and something said about maybe \$7,000, something about \$10,000 and something about 2% after the first year and might have been something said about 5%, but I think that these two men who were delegated to negotiate with Mr. Held—I think they were given no specific instructions as to just what it was to be.

Q. Now, at the time of this meeting of June 9, 1953, did you vote for this resolution declaring Mr. Held's purported employment at an end? Just whether you did or did not vote in favor of it.

A. Of course I happen to be the chairman.

Q. You didn't vote. Well, now will you state why you were, if you were, in favor of declaring his employment at an end?

A. Yes, I favored that.

Q. Why?

Mr. Trask: Object, if the Court please. No bearing on the issues here.

The Court: Oh it may, go ahead. You may answer.

A. I just didn't think that Mr. Held was the man that we wanted. Nothing personal against him, but I [195] just didn't think that he was the man that we needed for the place, didn't think he was doing the job that we wanted done.

(Testimony of D. O. Essley.)

Q. What did you notice as to whether he was there on the job or taking any interest in it?

Mr. Trask: Again I object to counsel's leading the witness.

The Court: Yes.

Q. I will ask you to state about how often you were there at the plant during this 2½ months—2 months and 20 days that Mr. Held was there?

A. I think on an average of probably 2 to 3 times a week.

Q. How many times did you ever see Mr. Held there aside from the 3 board meetings that have been testified to?

A. I believe not to exceed 3 times.

Q. I will ask you whether anyone knew where he was?

Mr. Trask: Object to the form of that question.

The Court: Well, somebody knew; he himself, I guess.

Q. Did you make any inquiry to try to find out where he was? [196]

A. Yes, I asked at times where he was.

Q. Could you find out? A. No.

Q. And whom did you ask? Whom did you ask as to where he was?

A. The secretary, our assistant secretary.

Q. Did you ever talk with the telephone operator about it or not?

Mr. Trask: Object to it, leading.

The Court: Yes.

Q. You heard the testimony of Mr. Held that

Testimony of D. O. Essley.)

During some week he was calling on the board members. Did he ever call on you at your farm?

A. Yes.

Q. How many times did he call?

A. I believe about 2 times.

Q. And what did he talk about?

A. Well, I think his first visit was just more or less a friendly call. Then on his second visit we were discussing something with regard to the fertilizer plant and also with regard to employing a man to head the fertilizer department.

Q. And when was that, about, with respect to when he first came there on April 1, as near as you can figure? [197]

A. Well, I think the first visit was not too long after the 1st of April. The second must have been long in May. I don't recall the date.

Q. I will ask you to state about how many times you tried to find Mr. Held there at the place of business or the plant and were unable to?

A. Oh, maybe once or twice.

Mr. Laney: You may take the witness.

Cross-Examination

by Mr. Trask:

Q. Then as I understand it, Mr. Essley, at the meeting when you determined that you were going to vote to terminate his contract you just decided that you had had a change of mind as to whether he was the right man or not. That is your position, is it not? A. Very largely true, I think.

(Testimony of D. O. Essley.)

Q. With respect to the legality of this contract did you testify that you first saw this contract shortly after March 6, 1952?

A. No, that was in April, probably the 10th, 15th of April, something like that when I first saw it.

Q. That was the first time you had seen the contract?

A. Yes, might have been a little earlier than that.

Q. Might have been around the 1st of [198] April, sometime?

A. Probably not before the 10th.

Q. And did you make any objection to the contract at that time?

A. No, I don't know that I did.

Q. You were then the president of the corporation? A. That is right, after April 3.

Q. Was Mr. Wahmsley at the meeting at which he was authorized as you testified to participate in the negotiations and work out the details?

A. I think maybe he was at the beginning of the meeting but was excluded before the action with reference to the particular question came up.

Q. In other words, your testimony is that your best memory of it now is that he was discussed before the action was taken authorizing him to participate in the negotiations? A. Yes.

Q. You were president at that time?

A. Yes.

Testimony of D. O. Essley.)

Q. Did you ever take any steps to inform him that he was one of the ones to negotiate?

A. I don't know that I did.

Q. Did you instruct anyone else to—— [199]

A. I believe not.

Q. If you were depending upon him to do it didn't you think it was important to see that he did know that he was supposed to?

A. Might have been.

Q. But you didn't take any steps to do so?

A. No.

Q. You knew that when Mr. Held came there that he was coming there to undertake the employment on a contract of some kind, did you not?

A. I knew nothing about his contract. Of course I wasn't in the place of president at that time and we were sort of leaving that up to Mr. Smith and Mr. Wahmsley.

Q. Well, after you became president did you take any steps to find out?

A. No, that had already been done.

Q. Now with respect to the manner in which he performed this contract, you say that you were in the co-op, you would say, around 2 to 3 times a week? A. I would say that is about correct.

Q. You weren't there always on official business as president, sometimes you were there as a customer of the store to buy things, is that not [200] correct? A. That is right.

Q. So you don't mean to tell the Court each time you went there you went to Mr. Held's office, some-

(Testimony of D. O. Essley.)

times you were in and out as a customer of the place, were you not? A. That is right.

Q. Well now, how many times that you went there did you actually go back and try to find Mr. Held?

A. Well, I usually came in sight of his office. I could have seen him if—I could have seen him.

Q. If he had been at his desk you could have seen him, you think? A. Yes.

Q. There were a lot of other places he could have been other than right at his office, isn't that right? A. That is right.

Q. Any of those times he could have been on company business or tending to his business, could he not? A. Probably could.

Q. You don't mean to tell the Court simply because you didn't see him at his desk he wasn't [201] tending to his duties as manager of the corporation, do you?

The Court: I don't see why you are laboring this point. He said a minute ago he only tried once or twice to find him when he couldn't find him.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Did you learn from the other employees whether he was there on the job?

Mr. Trask: Same objection heretofore made.

The Court: Same ruling.

Testimony of D. O. Essley.)

Q. Counsel brought out from you that you first saw the contract, this contract, sometime along about April 4 I think you said, and that you didn't make any objection to it then. I will ask you whether you knew at that time that Mr. Wahmsley had not been consulted in formulating the contract?

A. No, I did not.

Mr. Laney: That is all.

Recross-Examination

by Mr. Trask:

Q. Didn't you exercise some judgment of your own when you read it as to whether it was proper or improper? [202]

A. Well, I wasn't very competent to pass on legal phases of that and inasmuch as the contract had been put through the man was on the job, I didn't pay a whole lot of attention to it.

Mr. Trask: That is all.

Mr. Laney: That is all.

I. F. COLLIER

called as a witness by and on behalf of the defendant, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. I. F. Collier.

Q. What is your business, Mr. Collier?

A. Well, I guess I am a farmer.

(Testimony of I. F. Collier.)

Q. I will ask you whether you have any connection with the two co-operatives that are named as defendants in this case? A. Yes.

Q. What connection?

A. I am a member of both boards and secretary of the United Producers and Consumers Co-op.

Q. And who is the assistant secretary of United Producers and Consumers?

A. Pauline, we call her. Mrs. McInerney. [203]

Q. Now I will ask you whether you were present at the meeting of the Board of Directors there held on March 6 of 1952, the one in which some resolution about employment of Mr. Held was passed?

A. I was.

Q. Now at that meeting of the Board of Directors did Mr. Held at any time state that he would consider accepting the job of manager only on a 3-year term?

Mr. Trask: If the Court please, I continue to object to leading questions and request the witness be permitted to testify.

The Court: Yes.

Q. You heard the testimony of Mr. Knox to the effect that Mr. Held said that he would only consider the job of manager on a 3-year term. Did you hear that? A. I did not.

Q. You heard Mr. Held's testimony about that, did you, here?

A. I didn't hear anything of that kind mentioned, no.

Q. That is at the meeting you didn't hear any-

Testimony of I. F. Collier.)

ning of that kind mentioned? A. No. [204]

Q. Was there some discussion at that meeting
r any discussion about any term of employment
f Mr. Held, any length of employment?

Mr. Trask: Same objection, leading and sug-
gestive.

The Court: Well, he has asked him whether
ere was any. Go ahead.

A. Yes, there was some discussion on the em-
ployment of Mr. Held, yes.

Q. What was said in that discussion?

A. Well, as I remember it got quite—we was
discussing it on all sides. You would have to be a
renographer to say what was said. If I am per-
mitted, that was the reason that we appointed 2 men
o work out terms with Mr. Held.

Q. Well now, was there any agreement made
ere other than this resolution to appoint Mr.
Smith and Mr. Wahmsley to work out the terms
nd to employ him? A. There was not.

Q. Did you hear the testimony of Mr. Knox
hen he was testifying here? A. Partially.

Q. Did you hear his testimony to the effect that
ere were instructions given to Mr. Smith and
Mr. [205] Wahmsley that they could go to \$10,000
r 5% of the net? Did you hear his testimony about
hat? A. Yes.

Q. Well, did that happen?

A. Not to my knowledge, no.

Q. Were you there all the time? A. I was.

Q. Now was there any agreement reached there

(Testimony of I. F. Collier.)

as to the basis of compensation?

Mr. Trask: Same objection, leading and suggestive.

The Court: Oh, go ahead.

Q. Was there? A. There was not.

The Court: What were these 2 men appointed for? Why were they appointed? What were they supposed to do?

A. Well, the board seemed to be kind of unable to agree on any one thing. I don't know how many there were, 6, 7 or 8—10, I guess, and I moved that they appoint the 2 men, Mr. Wahmsley and Mr. Smith, to work out terms with Mr. Held.

The Court: Then that authority was delegated to those 2 men?

The Witness: That is right. [206]

The Court: To do that?

The Witness: That is right.

The Court: And they did it?

The Witness: Mr. Smith.

The Court: There is a question whether Mr. Wahmsley did. Mr. Smith did. All right.

Q. Were you present at the meeting of June 20, 1952, when there was some resolution terminating the employment of Mr. Held? A. I was.

Q. I will ask you whether you voted in favor of that. Did you vote in favor of that resolution?

A. Sure, yes.

Q. I will ask you to state why you came to that decision?

A. For the simple fact that as far as my way

Testimony of I. F. Collier.)

Q. Looking at it, Mr. Held wasn't tending to any part of the business there as manager of the co-op.

Q. Go ahead and explain that further.

A. Well, he was to my knowledge never there.

Q. How often would you be there?

A. I would say from 3 to 5 times a week.

Q. And could you find him there? [207]

A. I saw him there 2 times in the 2 months and 10 days that he was paid for services.

Q. I will ask you whether he had left word with anyone as to where to find him?

Mr. Trask: Object to the form of the question. He has asked whether he left word with anyone.

The Court: Yes.

Q. Did you make inquiries to try to find him?

A. I did.

Q. And could you find out?

A. I couldn't find out nothing.

Q. Did you know the girl that was his secretary or supposed to be his secretary there?

A. I suppose I did, but not—I couldn't point her out right now.

Q. Did you make any inquiry of her as to where she was?

A. I don't think so. If I might ask a question here, was she supposed to have been in Mr. Held's office or not? I never did see her there.

Q. You didn't see her there? A. No.

Q. Whom did you inquire of?

A. Oh, I inquired of the telephone girl, [208] the different heads of departments, Pauline, for

(Testimony of I. F. Collier.)

instance, quite a number of them around, I don't know. Being in there once in a while I couldn't understand why we were paying \$10,000 a year for a man nobody could find or never see.

Q. You heard Mr. Held's testimony about he was around visiting the directors. Did he ever come to visit you?

A. No, not to my knowledge. He never found me, anyway.

Q. Well, where were you at the time?

Mr. Trask: At what time?

Q. During the time from April 1 to June 20 of 1952.

A. I was on the ranch and in town here.

Q. Were you ever able to see where Mr. Held was in any way giving any directions or trying to manage the business?

Mr. Trask: Object. That calls for a conclusion not based on any statement of fact or foundation in fact.

The Court: Yes.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask: [209]

Q. Mr. Collier, with respect to the board of the United Producers and Consumers, how long have you been on that board?

A. Well, ever since it was organized. Ever since the co-op was organized. I can't recall what year that was.

Testimony of I. F. Collier.)

Q. Around '34, something like that?

A. Possibly.

Q. And as a matter of fact most of the members who were originally on the board are still on the board?

A. No, I don't think so.

Q. Who were the original members of the board, Mr. Collier?

A. That is rather hard for me to say. Jack Lick. A man—has been dead a number of years, can't recall his name.

Q. May I help you? Incorporators of United Producers and Consumers were W. S. Dorman, S. S. Click, I. F. Collier, D. O. Essley and W. L. Smith.

A. That is right.

Q. Except for Mr. Smith, who passed away in March, March 25, 1952, all of those men are still on the board of the United Producers and Consumers, are they not? [210]

A. No, Mr. Dorman is not.

Q. Mr. Dorman is not?

A. No. Pardon me, can I ask the question who was the man that passed away? What was his name?

Mr. Laney: We can find out.

Q. Other than the man who passed away and Mr. Smith who passed away, the membership of the board has remained pretty much constant, has it not, Mr. Collier?

A. Well, yes and no.

Q. Mr. Dorman is a man who is practically retired now and lives in San Diego, does he not?

(Testimony of I. F. Collier.)

A. No, I think he is dead.

Q. Has he passed away? I didn't know that.

Q. Well, other than that then, the membership of the board of the United Producers doesn't change very much. They are re-elected for 3-year terms, are they not?

A. There has been some opposition, yes.

Q. Now with respect to the contract, when did you first see the contract, Mr. Collier?

A. I think it was the day we passed a resolution to discharge Mr. Held.

Q. That was June 20? [211] A. Yes.

Q. You had never taken a look at the contract prior to that time?

A. Didn't know there was one existing.

Q. What did you think the meeting was for at the time Mr. Smith and Mr. Wahmsley were delegated to negotiate with him?

A. We had never had a contract with a manager.

Q. I know, but what were you delegating them to do? What did you think you were doing when you were delegating them?

A. To make an agreement with Mr. Held.

Q. Then you just didn't think it would be put to writing, is that what you mean to say?

A. That is right.

Q. You had never inquired about it?

A. No.

Q. Did you ever take any steps to inform Mr. Wahmsley he was supposed to participate in that?

Testimony of I. F. Collier.)

A. I found out whether or not that he had been notified, yes.

Q. When did you find that out?

A. When did I find it out?

Q. Yes. [212]

A. Immediately in the next few days after the meeting.

Q. After what meeting?

A. The meeting when he was appointed to assist Mr. Smith in the formulating of this agreement.

Q. In other words, a few days after the meeting of March 6 at which time Mr. Wahmsley authorized, did you tell Mr. Wahmsley that he was authorized to help negotiate the contract?

A. I wouldn't say I told him, no. I asked him if he was notified of it, yes.

Q. So you discussed it with Mr. Wahmsley a few days after March 6 and it was your understanding that he knew that he was one of the ones who was authorized? A. Yes.

Q. Absolutely?

A. I wouldn't say absolutely, no, but I am quite sure that he knew that he was.

Q. Knew that he was authorized to participate?

A. I wouldn't say about that for sure because those things, I don't keep a record of all those things.

Q. Now as to whether or not Mr. Held was attending to business you say you were at the co-op around 3 or 5 times a week? [213]

A. That is right.

(Testimony of I. F. Collier.)

Q. By the way did you as a member of the Board of Directors or any of the members of the Board of Directors ever give Mr. Held any directions as to how he was to acquaint himself with the duties of manager and the business of the company and the area in which he was working? Did you ever give him any specific instructions whether from the outside in or inside out?

A. Never had any chance to.

Q. You saw him at board meetings?

A. Twice—2 times, in the 2 months that he was there.

Q. You attended board meetings, didn't you?

A. Yes.

Q. Mr. Held was at board meetings?

A. Yes.

Q. Did you ever give him any instructions at board meetings as to how you expected him to conduct himself specifically?

A. I can't say that I personally did.

Q. And neither did anyone else at the board meetings at any time make any complaint about the manner in which he was operating, did they, Mr. Collier? [214]

A. Well, it wasn't necessary.

Q. You didn't think it was necessary?

A. No.

Q. You say you made inquiries of him about his whereabouts and didn't find out where he was. Did you ever take any occasion to ask somebody, to have him get in touch with you? Did you ever leave word there you wanted him to get in touch with you?

A. No, I don't think so.

Testimony of I. F. Collier.)

Q. Did you make any investigation to see what he was doing when he wasn't in your sight, as you say, when you went in the building? A. I did.

Q. Did you find out where he was?

A. Nobody knew.

Q. I believe you have already testified you never asked his secretary?

A. I didn't know he had a secretary.

Mr. Trask: That is all.

Redirect Examination

by Mr. Laney:

Q. You say you did not see this written contract until this meeting of June 20, is that correct?

A. That is right.

Q. And did you have any knowledge that [215] Mr. Wahmsley had not been consulted in formulating the contract?

Mr. Trask: Just a minute.

Q. (Continuing): —until that time?

Mr. Trask: That is leading and suggestive and attempting to impeach his own witness on his own testimony.

The Court: Yes.

Q. When did you first learn that Wahmsley had not been consulted in the formulation of this contract?

A. I couldn't say about the dates, but it was long after we become very much dissatisfied with Mr. Held's service. At that time I began to inquire.

Mr. Laney: That is all.

Mr. Trask: No further questions.

EMIL ROVEY

called as a witness by and on behalf of defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Emil Rovey.

Q. And what is your business?

A. Dairy farmer, dairy and poultry, farming in Glendale.

Q. And I will ask you whether you are a [216] member of the Board of Directors of these 2 corporations that are defendant here?

A. I am on the board of the Southwest for about a year and a half. I have just recently been on for a year and a half or 2 years but I am one of the new members on that board.

Q. On the Southwest Co-Operative Wholesale?

A. That is right.

Q. You are not on the other board?

A. I am not on the United.

Q. Now I will ask you whether you were present at the meeting of June 20, 1952, when there was some resolution to declare Mr. Held's employment at an end?

A. Yes, sir, I was.

Q. I will ask you whether you voted to terminate that employment?

A. I did so vote.

Q. I will ask you to state what the facts are as to why you did that?

A. Well, from the various times that I have

Testimony of Emil Rovey.)

When I went down at the co-op normally I would get down there about twice a week. I had never seen Mr. Held at the co-op. Previously our other manager, who would always step in the office, say hello or how is everything going. [217] It was different when Mr. Held took over and pretty soon we got to wondering what he was actually doing. The other thing is the field men, the different men coming out in the country would ask me where is Mr. Held, they haven't seen him, the various departments. They haven't seen him or he hadn't been in the different departments, so piecing everything together we wondered whether he was on the job and how much of the time he was actually on the job and what he was doing and therefore we more or less came to the conclusion that if he wasn't taking interest in the co-op it was time that we do something and make a change.

Q. Well now, when did you first see this contract that is in evidence as Plaintiff's Exhibit 1? That is the contract of employment?

A. I don't think I ever did see the actual contract. It was at this last meeting that it was brought out, but as far as actually reading the contract I did not.

Q. Well, were you present at the meeting of March 6, 1952, at which there was some resolution about employing Mr. Held?

A. Yes, sir, I was.

Q. And I will ask you whether there was any agreement there other than the resolution that [218] was passed?

(Testimony of Emil Rovey.)

A. No, I think not. There was no other particular agreement. There was discussion of various types and it is hard for a whole board to get together to work out the terms of employment, so it was decided mutually among all the board members that Mr. Smith and Mr. Wahmsley would work out the contract and see that everything was signed up and all arrangements were made. It was left up to those 2 men to do that.

Q. Well now, did you hear the testimony of Mr. Knox to the effect that Mr. Held at that meeting said he wouldn't consider being manager unless he was given an absolute 3-year term? Did you hear that testimony of Mr. Knox?

A. No, I wasn't here, I am sorry, this morning.

Q. Well, was there any such statement that you heard at this meeting of March 6?

A. That he wouldn't accept the job without a 3-year contract?

Q. Yes.

A. As far as my recollection, no, I can't remember that he specifically said that he would not accept the job without a 3-year contract.

Q. Was there any agreement arrived at as [219] to any definite employment, any definite number of years?

A. No, as far as I remember we left that up for Walter Smith and Mr. Wahmsley to work out the terms of employment. I think that was left up to those two gentlemen.

Q. Was there any agreement by the board there

Testimony of Emil Rovey.)

With Held arrived at as to the measure of his compensation, his pay?

A. No, I think that was left up entirely to the discretion of these two men.

Q. Did Mr. Held call on you as a member of the board?

A. Yes, sir, he did. He was out at my ranch two different occasions. The first time shortly after he had arrived there he came out to the ranch. As I remember, we went through our new dairy barn out there and it was a very friendly sort of a visit. He told me he was contemplating a trip over to California, Blythe and that area, and on the second time he was out to the ranch was I think after he had received this wire questioning the legality of the contract and I told him I didn't know too much about it, to go see Mr. Essley, but that is about the extent of the contacts.

Q. You are referring to that wire that was [220] sent on May 27?

A. Yes, sir. That is after he had come back from Iowa.

Q. Will you give some idea of how large an operation these two companies make there, how many departments are there, about?

A. Well, there is fertilizer and insecticide, there is lumber, there is the feed department, there is the furniture department, the petroleum department and the hardware. I think that comprises most of them.

Q. You spoke something about the prior man-

(Testimony of Emil Rovey.)

ager. What was he accustomed to do in managing the business?

Mr. Trask: Object. Irrelevant.

The Court: Yes.

A. Well, from my previous experience——

Mr. Laney: No, the Judge said no. You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Rovey, you got to wondering, as I understood you, whether or not Mr. Held was interested in the job and whether he was occupying himself on the company affairs, is that what concerns [221] you? A. That is right.

Q. That is the principal thing that worried you, is that right?

A. Well, I was worried that he wasn't doing the necessary job as manager, that he wasn't taking interest. In my estimation as manager in as big a concern with all of those different various departments the manager is certainly going to have to spend a good deal of his time especially getting acquainted with the job at the job.

Q. Now did you ever talk to Mr. Held about that? A. Did I talk with him about it?

Q. Did you ever talk with Mr. Held about it?

A. No, sir.

Q. Did you ever go to Mr. Held and find out what he was doing?

A. Well, I went to the co-op. Like I say I was

(Testimony of Emil Rovey.)

ere a number of different times. I could never
nd him at his office, there was never a time that
had a chance to talk with Mr. Held at his office.
e was never at his desk when I was there.

Q. Did you ever leave word that you wanted to
et in touch with him?

A. Not particularly. [222]

Q. When he was out to the ranch, to your
anch—did he *out there* at any time?

A. Well——

Q. Let me ask the question, did you ever make
ny effort when you were wondering whether Mr.
eld was performing his duty did you ever make
ny effort to go to get in touch with Mr. Held to
t down and find out what he was doing when he
asn't doing what you thought he ought to be doing
nd talk the situation over with him?

A. Well, naturally as a farmer we are pretty
usy in our own business first of all and normally
y duties——

Q. I would like to have you answer the question,
id you or did you not ever make an effort to get
a touch with Mr. Held to find out why he wasn't
oing what you thought he should be doing?

A. I intended to if I could have found him at
ne office.

Mr. Trask: That is all.

Mr. Laney: But you couldn't find him?

The Witness: He was never there.

Mr. Laney: That is all.

RALPH ASHBY

called as a witness by and on behalf of defendants,
being [223] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Ralph Ashby.

Q. I will ask you whether you were a member of the Board of Directors of the Southwest Co-Operative Wholesale? A. I am now, yes.

Q. And were you a member of that board on March 6, of 1952?

A. The first day I became a member of the Southwest.

Q. Then I will ask you whether you are a member of the United Company? A. Yes.

Q. How long have you been a member of that?

A. October, 1951.

Q. I will ask you whether you were present at the meeting of the Board of Directors of March 6, 1952, at which there was some resolution passed concerning the employment of Mr. Held?

A. Yes.

Q. And were you present during the testimony of Mr. Knox here? [224] A. Yes.

Q. Did you hear the testimony of Mr. Knox to the effect that Mr. Held at that meeting stated that he would not take the job of manager unless he was given a full 3-year term? Did you hear Mr. Knox's testimony about that? A. Yes.

(Testimony of Ralph Ashby.)

Q. Is that correct? Is that your remembrance?

A. No.

Q. Did Mr. Held make any such statement there at that meeting? A. No, not at that meeting.

Q. And then did you hear the testimony of Mr. Knox to the effect that it was agreed there that Mr. Smith and Mr. Wahmsley would have authority to make a contract up to \$10,000 a year and up to 5% of the net or something? Did you hear his testimony about that?

A. Hear Knox's testimony?

Q. Yes. Well, is that correct? Was any such agreement arrived at? A. No.

Q. Well now, what was your purpose in delegating this to Smith and Wahmsley to work out the contract?

A. Well, Wahmsley was our auditor, we [225] figured he was capable of making out a contract with him, and Mr. Smith being the president of the company we figured he would be the man, the two of them should work it out together.

Q. Well now, when was it that you first became aware of the claim that Mr. Wahmsley had not been consulted in the formulation of this contract? When did you first become aware of that?

A. Not until the night of that meeting of May 27.

Q. Meeting of May 27. And when Mr. Held was here in the employ up to that time, up to May 27, did you have any knowledge of the fact that Mr.

(Testimony of Ralph Ashby.)

Wahmsley had not been consulted or concurred in the making of this contract?

A. Not up until May 27.

Q. Now were you present, Mr. Ashby, at the meeting of June 20, 1952, at which there was some resolution relative to terminating Mr. Held's employment? A. Yes.

Q. Now did you vote for that in favor of that resolution? A. Yes.

Q. Now I will ask you to state the facts as to why you wanted to terminate his employment. [226]

A. Well, every time I had been out to the co-op I had more or less made it a practice to go back and say hello, but I never could find him in and I just figured that he was out to the other departments and so when I would be over to the feed mill or in the lumber yard I would say "Well, how is the new manager making out?" "Well, I don't know, I haven't seen him." And so many of them had never met him that I got to inquiring around to the other departments, then we will know he hasn't visited that department and I figured well he just isn't on the job.

Q. And about how often would you come there? How many times a week?

A. Well, I didn't come very often, probably 3 or 4 or 5 times a month.

Q. And when you were there were you ever able to find him in—find him at the plant?

A. No, not when I would come in, no.

Q. I will ask you to state in a general way the

Testimony of Ralph Ashby.)

ature of the business and what is required in order
o manage that business.

Mr. Trask: Object. Calls for a conclusion,
pinion.

The Court: Yes.

Mr. Trask: Not proper. [227]

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Ashby, when you were in there 3, 4 to 5
times a month, you say, how many of the times did
ou see him there?

A. I didn't see him at all.

Q. That would be then you were there 3 or 4
times you would say during the month of April and
or 4 times during the month of May?

A. Yes.

Q. So you had an opportunity, you were in there
about 6 times maybe, something like that, during
that 2-month period, and how long would you stay
here at a time when you would go in?

A. Probably an hour to 3 hours.

Q. And did you ever leave word that you wanted
o get in touch with him? A. No.

Q. He did take enough interest, he came out to
our place to see you, didn't he?

A. He came by, yes.

Q. You don't testify to the Court the times you
didn't see him there that he wasn't on company
business, do you, Mr. Ashby? [228]

(Testimony of Ralph Ashby.)

A. Oh, no.

Mr. Trask: That is all.

Redirect Examination

By Mr. Laney:

Q. When was it that he came out to see you?

A. Along the middle of April, I guess. He was there about 30 minutes.

Q. What did he talk about?

A. He just asked me about the farm, just a few questions like that.

Q. Did he ask you anything about the business that he was supposed to manage? A. No.

Q. Just sort of get-together meeting?

A. Just a get-acquainted meeting, is all.

Mr. Laney: That is all.

Recross-Examination

By Mr. Trask:

Q. Did you ever give him any instructions as to how you thought he should conduct the business of manager?

A. No, I thought he should know that.

Q. But when he didn't do that the way you thought he should you never gave him any instructions as to how you thought he should vary from what he was doing, did you? [229]

A. Not that I know, no.

(Witness excused.)

PAUL HUNT

called as a witness by and on behalf of defendant,
being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. Paul Hunt.

Q. What is your occupation?

A. I am in the furniture department, supervisor.

Q. In other words, are you the head of that department?
A. Yes, sir.

Q. Were you in that capacity at the time when Mr. Held first came there on April 1, 1952?

A. Yes, sir.

Q. And were you in that capacity continuously from then up until June 20 at the time that his employment was terminated?
A. Yes, sir.

Q. What was your business and duties in that department? Just in a general way.

A. Just as a supervisor of the department [230] to see it operated properly, is all.

Q. And in a general way how large a business, how much overturn annually—sales?

A. I would say, well, run around \$20,000 a month.

Q. And how long have you been employed by the company?
A. Since '41.

Q. Your employment is by United, is it, or Southwest Co-Operative Wholesale—which pays you?

(Testimony of Paul Hunt.)

A. I get my check from United Producers.

Q. When did you first meet Mr. Held and under what conditions?

A. I wouldn't know what date, but Mr. Held came in to see me in the store.

Q. What did he come in for?

A. I imagine he came in to introduce himself, which he did. Then he asked about furniture for his new home.

Q. And what further did he do about that?

A. We discussed various pieces he might like. Then he made mention he might want to see, his wife to see them when she came to Phoenix with the family which I never got to see.

Q. Was anything discussed about a [231] catalog?
A. Yes, sir.

Q. What was done?

A. We ordered a catalog and it was in regard to some rattan furniture which we received.

Q. Did he ask you anything or make any suggestions about the running of the business?

A. No, sir.

Q. And how many times did you see him all told during this a little over 2½ months he was there?

A. I know personally I met him twice in the store, I know for sure.

Q. On either of those times did he make any suggestions or ask anything about the running of the business?

A. I don't think he came in purposely for that. I think he came more or less on business.

Testimony of Paul Hunt.)

Q. Did he make any suggestions or ask anything? A. No, sir.

Q. On the second time that he came in there that was the subject of the discussion, if you remember? A. It was still furniture.

Q. Still furniture for himself?

A. Yes, sir. [232]

Q. Did he ever give you any directions or instructions as to what to do?

A. We never got down into that, really.

Q. What?

A. We never got down to discussing the business.

Q. Did he ever come and inquire into or show any interest in the running of that business?

Mr. Trask: Object. Calls for a conclusion.

Q. Did he make any inquiries about the business? A. Not about the business.

Mr. Laney: Take the witness.

Cross-Examination

By Mr. Trask:

Q. Mr. Hunt, the way the setup is out there you are in charge, you say, of the furniture department? A. That is right.

Q. How much of the time are you there?

A. I am there every day from 8:30 to 5:30 except one day a week. Every other week later. One day every other week.

Q. Is there somebody that is in charge of [233]

(Testimony of Paul Hunt.)

the several departments of the furniture, the hardware, and the lumber, and so forth?

A. That is correct.

Q. Who is that?

A. The one in charge of the lumber.

Q. No, isn't there Mr. Huber that is in charge of the coordinating of the several different departments?

A. Mr. Huber I would say is in charge of quite a few departments, an overseer, perhaps. I wouldn't know what his capacity is, I never have been told.

Q. Well, he oversees the furniture department to some extent?

A. He does our buying for us.

Q. And oversees some of the department operations, does he not?

A. It is up to me entirely to see—all he does for me is does our buying.

Q. And do you know at the time Mr. Held came in there about twice and talked to you about his own furniture?

A. Well, I was there personally, yes.

Q. Do you know whether he was in there other times when you weren't there?

A. I was never told whether he was or not. [234]

Q. You have been employed there since '41?

A. Correct.

Q. Did you ever attend any staff meetings, the heads of departments?

A. This was one meeting called while Mr. Held was there and I presume they were mostly depart-

Testimony of Paul Hunt.)

ent heads and what was discussed was merely
ore or less to get acquainted.

Q. Did you attend that meeting?

A. Yes, sir.

Q. When was that?

A. I wouldn't know what date.

Q. Did you just attend one meeting, one staff
meeting? A. One only.

Q. And all the other heads of departments were
ere?

A. I wouldn't say they were all there, there was
t least a few there.

Q. Where was it held?

A. In the office that was formerly Mr. Martin's
fice.

Q. Where Mr. Held then had his office?

A. Yes.

Q. Did he discuss with you then or did he [235]
avite you to tell him any problems you might have
n the furniture department?

A. Not particularly about the furniture. We
discussed what we needed done to the building.

Q. And did you offer suggestions at that time?

A. That is correct.

Q. General discussion of the affairs of your de-
artment and your particular building, is that not
ight?

A. That is correct about the building particu-
arly.

Q. Didn't you attend any other staff meetings?

A. No, no other meetings besides that.

(Testimony of Paul Hunt.)

Q. That is the only staff meeting you attended?

A. That is right.

Q. You don't say there were not others held?

A. I wouldn't know if there was.

Mr. Trask: That is all.

Mr. Laney: Were you ever invited to any except this one?

The Witness: No.

Mr. Laney: That is all.

JOE HURON

called as a witness by and on behalf of defendants,
being [236] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Joe Huron.

Q. I will ask you whether you are in the employ of United Producers and Consumers?

A. Well, not at the present time, no. I get my check from the Southwest Co-Operative Wholesale.

Q. Have you been in the employ of one or the other of these companies for a good many years?

A. Yes, sir.

Q. And when did you first start to work for them?

A. Oh, I don't remember exactly. I think about 1939—1938.

Q. And that was which company?

Testimony of Joe Huron.)

A. That was the United Producers and Consumers.

Q. Will you state what your department and duties are and were? Were you there in the employ during the time when Mr. Held was there from April 1 of 1952 until June 20 of 1952?

A. Yes, sir.

Q. During that time what was your department and the nature of your duties? [237]

A. Well, more or less operations manager, and I had charge of all maintenance, construction, and even the transportation. I had charge of the trucks and cars of the company, see that they were kept in repair.

Q. What else did you do?

A. Well, most anything that come up. If there was any trouble come up they called me. I had to get it straightened out some way.

Q. I will ask you when you first met Mr. Held as near as you can fix it?

A. I believe I met him in the insecticide department, Mr. Martin brought him over there before he was employed by the company.

Q. We will come to the matter of after his employ. Did you see him at all after his employ?

A. One time, yes, in the insecticide department. He came there and Mr. Martin started to introduce us again and made the remark that we had met earlier before.

Q. Did he ever advise you—with you or direct you about what to do in your department?

(Testimony of Joe Huron.)

A. Not very much, sir. I think I talked to Mr. Held about twice in his office about different operations in regard to the business. [238]

Q. What have you to say as to whether he was there on the job or not?

Mr. Trask: If the Court please, object. Not proper question as to this witness. He doesn't know whether he was on the job or where he was on the job.

The Court: Oh, I don't think so.

Q. Did you ever try to see Mr. Held when you couldn't? A. Many times, yes.

Q. Relate the circumstances of why you would want to see him and what you did.

Mr. Trask: May we have the foundation, time and place?

Q. Well, when as near as you can fix it—when did you first try to see him when you couldn't?

A. Well, I don't know when as far as the date and time is concerned, but there was many times that I come to the office to discuss something with him in regard to the operations of the company and he wasn't there.

Q. How many times would you say you tried to see him when you couldn't find him?

A. Numerous times.

Q. Could you give some estimate? [239]

A. I would say 15 or 20 times.

Q. Did you find out where he was?

A. I didn't delve into that, to be truthful, sir.

Testimony of Joe Huron.)

I just wasn't there and I went on about my business.

Q. State whether or not you were endeavoring to confer with him as manager about the running of your department.

Mr. Trask: Object to counsel's leading questions.

The Court: Yes.

Q. What were you trying to contact him about?

A. As I stated before it was always in reference to some operation of the company that I wanted to discuss with him or purchasing some machinery or something, something that was necessary at that particular time. We were quite busy in rebuilding our insecticide plant.

Q. Well now, did you ever try to see him about the machinery, the insecticide plant?

A. Yes, sir.

Q. And what about that? Tell why you did and whether you could see him.

A. Well, I just didn't find him, that is all. [240]

Q. Did you hunt for him and try to find him?

A. I am generally from one end of that place to the other a number of times a day in my rounds, I never did run into him.

Q. Well, at that time what was wrong at the plant?

A. Oh, nothing particularly wrong, just the fact that we were remodeling our insecticide department, getting ready for our season on insecticides.

Q. Was there anything about some mixer there that there was any difficulty about, do you recall?

(Testimony of Joe Huron.)

A. No, outside of the fact that we tried one phase of the operation, it didn't work out just right and I wanted to see Mr. Held and see if he would be in accord with putting a mixer up in place of a tank that we had, what I would call a holding tank, and at that time I found that he had gone some place over the week end or out of the state, so I went ahead and took it upon myself and I consulted with McInerney and went ahead and we decided what we would do and went ahead and done it, that is all.

Q. Did he ever make any inquiries of you or any suggestions about the running of your department?

Mr. Trask: Same objection, if the [241] Court please, leading and suggestive.

The Court: He may answer.

A. Well, as I say I think twice I discussed the operations of the plant with Mr. Held in his office. Other from that I more or less went on with my work to the best of my ability and if I had anything I wanted to talk to him about I tried to see him, if he wasn't there I just went on about my work.

Q. What have you to say as to whether he showed any knowledge or tried to acquire any knowledge of the workings of your department?

Mr. Trask: Object. Calls for a conclusion.

The Court: Yes.

Q. What did you do in your capacity there in

Testimony of Joe Huron.)

the way of production of insecticides and fertilizers, what did you do about that?

A. Well, I more or less was in charge of that phase of the operation at the time.

Q. And will you give us some idea of what an operation that was, how much in dollars and cents could you turn over in these particular months when Mr. Held was there, say April, May and June?

A. Well, not in dollars and cents I couldn't tell you, no, but in tonnage I would say possibly [242] in the first part of June we were working 3 shifts on our technical grinding around the clock.

Q. Can you give some idea, though, of the amount in dollars and cents that would be turnover?

Mr. Trask: Object to the witness testifying. He said he can't answer, not qualified.

The Court: He said he didn't know.

The Witness: No.

Q. Who, if you know, was in charge of the machinery of the feed mill and the lumber yards and the oil racks? A. Well, I was.

Q. Who was in charge of the trucks and cars used by the company? A. I was.

Q. Approximately how many trucks and cars was that? A. About 30, I would say.

Mr. Laney: You may take the witness.

(Testimony of Joe Huron.)

Cross-Examination

By Mr. Trask:

Q. Who has talked to you, Mr. Huron, about your testimony coming up here? Who talked to you about what you were going to say? [243]

A. Nobody talked to me about what I was going to say because——

Q. Who talked to you about coming up here? Who was it? A. Miss Gentry told me.

Q. Miss who? A. Gentry.

Q. Are you referring to the lady at Mr.——

Mr. Laney: You still call her by her single name—Mrs. McInerney.

Q. She was the one?

A. Yes. She called me.

Q. You are still employed there?

A. Yes, sir.

Q. Did you ever attend any staff meetings at Mr. Held's office? A. No, sir.

Q. Never attended any?

A. Only myself, myself and him.

Q. Just yourself and him?

A. That is right.

Q. You testified you went up there a couple of times and that he was down at your place how many times?

A. Once is all. After he was with the [244] company. He was there once before. He came there with Mr. Martin.

Testimony of Joe Huron.)

Q. What did he discuss with you the first time he was down there without Mr. Martin?

A. Well, as I recall I believe I explained to him the fact that we had tried out a certain phase of this operation in our technical grinding and it hadn't worked the way that we had expected it to and I believe that was after I had put another mixer—I will call it—or another tank with a screw conveyor in it up there.

Q. Did you ever leave word at his office that you wanted to get in touch with him?

A. Not particularly, no, I don't believe I did because as I say, the phase of my employment out there I am all over the place, several times a day.

Q. You have been there for a long time and that department has been running for quite a while, hasn't it, Mr. Huron?

A. That is right, about 15 years, I think—15, 16 years.

Q. Do you recall one occasion, for instance, when you testified about when Mr. Held brought a group of students from the University and had you speak to [245] them and go through your department?

A. Yes.

Q. You have forgotten that occasion, I guess.

A. No, not necessarily. That happens pretty near every year. Why should I forget or remember just one phase of it?

Q. You were just testifying as to the number of times he had been down.

A. I didn't figure that he was down there to

(Testimony of Joe Huron.)

talk to me at the time anyway or find out or learn anything about the operations.

Q. You don't know what he was doing around the plant or where he was occupying his time or how he was going about familiarizing himself with the business, do you, Mr. Huron?

A. In a sense I do, yes.

Q. Your department is the insecticide and what is it—fertilizer?

A. Insecticide, fertilizer, general maintenance, construction, transportation.

Q. Other than the times when you talked to him actually do you know what he was doing the other times? A. No, sir, I do not. [246]

Q. You don't know that he was then not on company business at the time, you didn't see him, did you, Mr. Huron?

A. No, sir, I know he just wasn't there, that is all.

Q. You know he wasn't at your department?

A. Well, my department more or less took in his territory. I was in the main store, I would say, several times every day.

Mr. Trask: That is all.

Mr. Laney: That is all.

EVERETT BARBER

called as a witness by and on behalf of defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Everett E. Barber.

Q. What is your business?

A. I am manager of the lumber yard for United
Producers Consumers Co-Operative.

Q. What are your duties there? What kind of
business is that?

A. Well, we handle all types of building sup-
plies, shall we say. That is lumber, roofing [247]
materials, most material that would constitute a
building.

Q. How long have you been in the employ of
this company, about? A. Since July, 1946.

Q. When did you first meet Mr. Held?

A. I think officially the first time I met him was
when he called a meeting in his office. I don't know
just exactly the date of that meeting.

Q. You recall that he came there as manager
about April 1 of 1952?

A. That was my understanding.

Q. From that time until he ceased to be em-
ployed there on June 20 of 1952 how many times
did you see him?

A. Officially I would say 3 times.

Q. You say officially, in what way did you see
him? What was discussed?

(Testimony of Everett Barber.)

A. Well, officially—by that I mean I had seen him at a distance, but to actually talk to him I had seen him 3 times.

Q. What did he talk about and under what conditions? Let's name the first time.

A. The first time was in his office. He had called a meeting there of the department heads, so I understood. [248]

Q. And how long did that meeting last about this meeting of department heads?

A. Oh, I would say 15 minutes to half an hour, probably.

Q. 15 minutes to half an hour, and did he give you any directions as to how to run your department or discuss with you how to run it?

A. Well, the only discussion we had at that time I know he asked what corrections may be made generally in the business.

Q. You say there was one more meeting than that that you had with him, or 3—2 more?

A. There are 2 more, yes.

Q. And the next meeting, where was that?

A. At the lumber yard. We had, in this first discussion or first general meeting, talked about or at least I had brought up about the condition of one of the driveways and he came down and we discussed that.

Q. And how long did you discuss that?

A. Oh, I would say 10 or fifteen minutes, possibly.

Testimony of Everett Barber.)

Q. What was the length of his visit there at the lumber yard?

A. That was the duration at that time.

Q. Then the next time that he was there, [249] where was that meeting?

A. That was at the lumber yard also.

Q. What was the subject matter of that?

A. At that time we were discussing the possibilities of a parking lot over on the corner of 19th Street and Jackson Street where the incinerators are.

Q. Did he ever give you any directions or suggestions as to how to run the business there?

A. Those were the only things we discussed.

Q. Well then, what is your answer, did he give you any directions as to how to run the business?

A. No, sir.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. You have been running that since 1946?

A. Yes, sir. No, sir, I haven't. I will retract that statement. I have been employed there since 1946, but I was not manager all that time.

Q. How long have you been in charge of the lumber department?

A. I believe the last 3 or 4 years.

Q. But prior to that time you had been [250] in the lumber department?

(Testimony of Everett Barber.)

A. I have always been in the lumber department since 1946.

Q. You knew something about it, did you?

A. Yes.

Q. You felt you knew quite a little bit about it when you became manager, did you not?

A. Well, I won't say I thought I knew a great deal about it, I did know something about it.

Q. At least your services as manager during the past 4 or 5 years running that operation have been satisfactory to the Board of Directors and the previous manager, had they not, so far as you know?

A. Well, I hope they had.

Q. You never had too much criticism about it, things have been going along all right down at the lumber yard, had they not?

A. Yes, sir.

Q. Mr. Held didn't come in and immediately change that all around or change the routine or give any particular directions, did he?

A. We had never discussed that part of it, no, sir.

Q. Did you have any fundamental problems of management of your department that you weren't able to [251] cope with?

A. No, sir.

Q. You saw him, you say, a number of occasions out and around the place but officially only 3 times, is that your testimony?

A. That is correct.

Q. And you attended how many staff meetings?

A. One.

Q. Do you know as a matter of fact that there were other staff meetings other than the ones you

(Testimony of Everett Barber.)

attended? A. I don't know.

Q. You don't know. You found him interested in your problems when you raised them, did you not, Mr. Barber?

A. On the occasions when we discussed it, yes.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Were you invited to any other staff meetings with Mr. Held? A. No, sir.

Mr. Laney: That is all.

HARRY PURDY

called as a witness by and on behalf of the [252] defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Harry Purdy.

Q. I will ask you whether you are in the employ of one of these companies—that is defendants here in this suit?

Q. I have been in the employ of Southwest Co-Operative Wholesale since April of 1946.

Q. What is your position now?

A. Office manager for the company.

Q. And during the time when Mr. Held was there from April 1 to June 20 of 1952 what was your position then?

(Testimony of Harry Purdy.)

A. I was head bookkeeper.

Q. And as such were you in the main office there of the company? A. Yes.

Q. Now I will ask you what had been the practice about reports and going into phases of the business and so on in the past there?

Mr. Trask: Objection. Has no bearing on this inquiry.

The Court: I don't see where it [253] could.

Q. I will ask you whether Mr. Martin—whether Mr. Held while he was manager there ever gave you any directions or made any inquiries about your department?

A. No, outside of being introduced to him he never spoke to me.

Q. I will ask you whether you kept records of time that the employees worked and records on the efficiency of the employees?

A. Yes, we kept a complete time sheet and individual records of employees.

Q. I will ask you whether he ever made any inquiry there about those records of employees?

A. Not to my knowledge.

Q. Did he ever talk with you at all about the business of the company?

A. Never did mention it.

Mr. Laney: You may take the witness.

Testimony of Harry Purdy.)

Cross-Examination

by Mr. Trask:

Q. Mr. Purdy, did you while Held was there furnish those employment efficiency sheets or time sheets, whatever it was Mr. Laney was talking to you about? Did you furnish those to Mr. Huber?

A. Mr. Huber? [254]

Q. Yes. Would he come in at times and get them?

A. It has been the practice down there—Mr. Huber as general manager would review our employment records and then take it up with the general management to decide what is to be done. Mr. Huber was—never to my knowledge had the authority to take it on to himself to go ahead and transfer personnel or to give raises without being okayed by the management.

Q. And did you know as a fact that Mr. Huber during Mr. Held's time as manager down there would take those records and take them in to Mr. Held? Do you know that he did that?

A. That I don't know.

Q. You don't know? He could have and you wouldn't know about it, is that correct?

A. Yes, either way, I wouldn't know.

Q. As a matter of fact, who was in charge of our department at the time Mr. Held was there?

A. Mr. Leonard, Jim Leonard.

Q. And you would see Mr. Held in there talking to Mr. Leonard from time to time, would you?

(Testimony of Harry Purdy.)

A. I saw Mr. Held in the office and talked to his secretary a few times, but to my knowledge if he talked to Mr. Leonard it was in his office, I didn't see him around the department. [255]

Q. But you don't say that he didn't talk to the head of your department, Mr. Leonard, from time to time, do you?

A. No, I couldn't say because I don't know.

Q. Mr. Leonard would be the logical one to take up problems concerning your department with, he was the head of it, wouldn't he be the logical one Mr. Held would discuss these matters with?

A. He discusses the matters, but generally Mr. Leonard would pass any analysis on to me to be worked up and I didn't work any up.

Q. You don't know whether Mr. Leonard worked any analysis up for Mr. Held?

A. Well, he could have. That I couldn't say.

Q. At that time you were not the head of the department? You didn't sit in on the staff meetings as such, did you? A. No, I didn't.

Q. You knew as a fact he held staff meetings from time to time, did you not?

A. I know he held one because Mr. Leonard told me that he would be in the office and for me to take over if anything come up.

Q. Did you have any particular problems to take up with Mr. Held that you did take up with [256] him?

A. No, this department runs pretty well on its

Testimony of Harry Purdy.)

own unless someone wants an analysis of any department or profits.

Q. Mr. Held didn't come in and make any dramatic or drastic changes in the manner in which you had been operating through the past years, did he?

A. No, everything went on the same.

Mr. Trask: That is all.

Redirect Examination

by Mr. Laney:

Q. I will ask you in the usual run of the business there who it was that the manager came to to get these analyses about employees?

A. Well, generally he would go to the office manager, which was Mr. Leonard.

Q. Who was it who worked them up?

A. In most cases—sometimes he would, most cases I would because I had the time available.

Q. And what was the custom as to where the manager would come to get these analyses?

A. Well, sometimes he would call the office manager into his office or sometimes he would come out here in the main office.

Q. Did Mr. Held ever come out there to get any of those analyses to the main office? [257]

A. Not that I know of.

Mr. Laney: That is all.

(Testimony of Harry Purdy.)

Recross-Examination

By Mr. Trask:

Q. You are still employed down there—still working? A. Yes.

Q. Mrs. McInerney called you about coming up here?

A. She called this afternoon and told me to come up.

Mr. Laney: May I ask this—this man who was head of the department, is he there now any more?

The Witness: Mr. Leonard? No, he left two months ago.

Mr. Laney: And you are head of the department?

The Witness: I am head of the department now.

WANDA SCHOEN

called as a witness by and on behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney: [258]

Q. What is your name, please?

A. Wanda Schoen.

Q. Is it Miss or Mrs.? A. Mrs.

Q. Mrs. Schoen, what is your employment now?

A. I am on the switchboard, PBX telephone.

Q. That is the switchboard there at the office of these two companies that are involved in this litigation? A. Yes, sir.

Testimony of Wanda Schoen.)

Q. I will ask you whether you were switchboard operator there during the time when Mr. Held was there from April 1, 1952, until about the 20th of June of 1952?

A. Well, I wasn't there right from April 1. I started my employment there April 28.

Q. You started there April 28. Who was the switchboard operator before you?

A. Well, I believe her name was Betty Cannon.

Q. Do you know where she is?

A. No, I don't right now.

Q. From April 28 then on during the time that Mr. Held was there until June 20, what did [259] you observe as to whether Mr. Held remained there at the job or not?

A. Well, I observed that I didn't ever get to meet him and I had a call or two for him and would ring in his office and if he wasn't there, which was quite a few times I didn't know what to do with the call, how to handle it.

Q. What did you observe as to whether he was there most of the time or gone most of the time?

A. Well, he was definitely gone most of the time.

Q. Did he leave any word with you as to where to find him or where he was when he was gone?

A. No, because I used to have to ask Mrs. McInerney there if she knew.

Q. Would she know where he was?

A. No.

Mr. Laney: Take the witness.

(Testimony of Wanda Schoen.)

Cross-Examination

By Mr. Trask:

Q. You say you began work there April 28?

A. Yes, sir.

Q. How many girls are on the switchboards down there?

A. Well, I am the full-time girl and then [260] there are one or two relief girls.

Q. During a period of a day how many different girls are on the switchboard?

A. Just two, myself and the relief girl, and the relief girl just relieves at lunch and maybe 10 or 15 minutes other than that.

Q. Intervals during the day? A. Yes.

Q. Is there just one girl that has been on as relief girl since you have been there April 28?

A. Well, there was only one from April 28 until sometime last summer.

Q. You say Mr. Held never on any occasion while you were there you don't recall any occasion of his having left word with you where he was when he left? A. No, sir, I don't.

Q. You never recall any occasion of that?

A. No.

Q. You testified in answer to Mr. Laney's question that he wasn't there hardly at all. Where is your office with relation to his?

A. Well, my switchboard is right out in the store. It is in the rear of the store and Mr. Held's

(Testimony of Wanda Schoen.)

office was right in back of me, so that he would come right by on his way out. That was about [261] the only time I ever saw him was on his way out.

Q. You don't know what he was doing or whether he was on company business or what he was doing at the times he was out, do you, Mrs. Schoen? A. No, I don't.

Mr. Trask: That is all.

Mr. Laney: That is all.

LEWIS G. WAHMSLEY

called for cross-examination by the plaintiff, having been previously sworn, resumed the stand and testified further as follows:

Redirect Examination

(Continued)

By Mr. Laney:

Q. Mr. Wahmsley, counsel has brought out from you something about margins in some of the years. Have you the data so that you could give the margins in the Southwest—produced by the Southwest Co-Operative Wholesale or shown by their records from the year 1948 through the year 1952 just to compare it? Do you have those data?

A. Yes, I do. Revolving fund certificates to Southwest Co-Operative Wholesale for the fiscal year ending February 28, 1948, \$193,447.01.

Q. Now you say that was what?

A. That is revolving fund certificates [262] issued for margin for the year—

(Testimony of Lewis G. Wahmsley.)

Q. That is the margin, is it?

A. That is of the Southwest, yes.

Q. Now that was for the year 1948?

A. Fiscal year ending February 28, 1948.

Q. It was really mostly the year 1947?

A. Yes.

Q. Then for the fiscal year ending February 1, 1949, what was it?

A. Well, it is February 28, 1949, would be \$143,569.30.

Q. That ending February 28, the year ending February 20, 1950, what was the margin?

A. \$121,555.11.

Q. And then for the year ending February 28, 1951? A. \$249,204.02.

Q. Then the margin for the year ending February 28, 1952? A. \$406,102.79.

Q. Then for the year ending February 28, 1953?

A. \$194,975.68.

Q. As to the period then from February 28, 1953, onward now, what have you to say as to the condition [263] of the company with regard to what margins it may produce, good or bad or what?

Mr. Trask: Object, if the Court please. That would be speculative.

The Court: I think so.

Q. Well, what is the condition of the company now that has any bearing on its margin?

Mr. Trask: Same objection. I don't understand counsel's question.

The Court: I don't, either.

Testimony of Lewis G. Wahmsley.)

Q. Is the company functioning full tilt now?

A. No, it is not.

Q. What is wrong with it?

A. Well, in September, 1952, why the feed mill which is approximately 25 to 30 per cent of the gross volume burned down.

Q. And is it in operation yet?

A. It is not in operation full 100%. It is partially operating now, but there probably will be another 30 to 45 days before it gets in complete production.

Q. Does this co-operative have anything to do with cotton products?

A. Nothing other than furnishing the farmers who [264] are growing cotton.

Q. I will ask you whether there is any connection between the bolt of cotton that will be allowed and the income of this company?

Mr. Trask: Objection. If the Court please, going into matters that are speculative and have no bearing.

The Court: This man is qualified as an accountant, not an economist. He may be qualified as one, but you haven't qualified him.

Q. Then I will ask you from your analysis of these—well now what about the margin of the other company, of the Southwest Co-Operative Wholesale?

A. The other company is United Producers and Consumers.

(Testimony of Lewis G. Wahmsley.)

Q. I mean the other company, the United Producers.

A. Well, the United Producers and Consumers margin stays pretty close to the Southwest as the major portion of their income is derived from the revolving fund from the Southwest Co-Operative Wholesale. At the time of purchase United gets a cash discount which sometimes covers the cost of operation, sometimes it doesn't, but that cash discount is computed as closely as possible to cover the actual cost of [265] operation of the United Producers and Consumers.

Q. Well, then United went along about the proportionate same, didn't it?

A. Pretty much the same, yes.

Q. I will ask you whether you know what elements there are that go into making up or have an effect upon the making up of the amount of this margin in the future. What elements go into that?

Mr. Trask: If the Court please, I object. I think that is remote and speculative and has no bearing on this case.

Mr. Laney: We have to meet it. They are speculating about what is in the future, we just want to show the facts.

Mr. Trask: Except the difference we are basing it upon the facts of reports of actual earnings and now the question is directed to what future contingencies might occur which I think is getting too remote.

Testimony of Lewis G. Wahmsley.)

The Court: Go ahead, but I doubt that the Court will pay much attention to it.

The Court can speculate as well as the witness.

Mr. Laney: If the Court will pardon me, there is nothing speculative as to what they [266] think they will do in the future.

The Court: Well all right.

Q. What elements then do you say will have a bearing upon what the amount of margin of the companies will be for the fiscal year ending February 28, 1954, and then that fiscal year?

A. Well, the only fact that I can see that can have a bearing on it is the volume of business they do.

Q. What would that depend upon?

A. That depends upon supplies and what not required by the farmers.

Q. What would that depend upon?

Mr. Trask: I object as remote, speculation on speculation.

The Court: You may answer that if you want to.

Q. What are the elements—I just want the facts about what the prospects are.

A. Mr. Laney, that is hard for anyone to anticipate.

Q. All right, I won't press it. As to the few months in the spring, that is particularly those months of April and June, I will ask you whether they are average months or whether there is an increase in [267] activity during that time.

A. Well, that depends on the department which

(Testimony of Lewis G. Wahmsley.)

you are considering. Your farm supplies during those months are up. Your fertilizer is up but you don't have your insecticides. Your insecticides come in a period of July, August and September.

Mr. Laney: That is all.

Recross-Examination

By Mr. Trask:

Q. Mr. Wahmsley, did I note that you had reduced to writing the figures about which you have just testified? A. Yes.

Q. Would you have any objection if I took these? These are the figures that you reduced at my request, is that right? A. Yes, sir.

Mr. Laney: He wasn't testifying about those, was he?

Q. Is this the matter about which you just testified?

A. No, I was testifying on the Southwest, Mr. Trask.

Q. Oh, you didn't give us the combined [268] margin.

A. No, I just gave the Southwest. That is what he asked for.

Q. I had asked you for the combined margin.

A. Yes, and this is the combined.

Q. What you have handed me now is the combined margin? A. Yes, sir.

(Plaintiff's Exhibit 12 marked for identification.)

Testimony of Lewis G. Wahmsley.)

Q. Mr. Wahmsley, showing you Plaintiff's Exhibit 12, is this the combined margin about which you have testified, Plaintiff's 1 for identification?

A. Well this is the one, Mr. Trask, not the figures that I just testified in Mr. Laney's examination.

Q. That is right, but the figures you prepared at my request——

A. Yes, those are the ones prepared at your request for the combined net margin of the two companies for the years involved there.

Mr. Trask: Offer it in evidence.

(Plaintiff's Exhibit 12 received in evidence.)

Q. Referring to 12 in evidence, Mr. Laney has asked you about the margin figures for Southwest Co-Operative which you testified about. [269]

A. Yes.

Q. And Plaintiff's 12 in evidence contains the figures about which you have testified as to the margins of Southwest plus the margins as to the United? A. That is right.

Q. And shows a combined margin and in addition it shows the cash rebates distributed for fertilizer and insecticide for the years in question?

A. That is right.

Q. That is pursuant to your testimony this morning with respect to insecticides the margin was handled a little bit differently than with other merchandise?

A. On fertilizing and insecticide both due to the

(Testimony of Lewis G. Wahmsley.)

source of supply when it got critical you had to sell at what the competition was selling or thereabouts which was in excess of the desired margin and as a result a cash rebate was given on those items.

Q. Now, Mr. Wahmsley, I note that your figures for 1953, \$194,975.68 as the margin is of Southwest only? A. Yes.

Q. You don't have the figure of United for [270] that fiscal period?

A. It hasn't been completed, Mr. Trask.

Q. But you gave an estimate of what the margin would be as to United, did you not?

A. Yes, I did.

Q. What was that estimate? A. \$40,000.

Q. So that for 1953 the combined margin is approximately \$235,000? A. That is right.

Q. But in 1952 do I understand you to say you suffered a fire loss out there?

A. Yes, in September.

Q. That destroyed the feed mill?

A. Yes, it did.

Q. And what is the margin produced by the feed mill during ordinary fiscal periods operations?

A. Well, that is hard to determine exactly, Mr. Trask, because it is tied in with your farm service division; administrative costs are spread over the entire operation there.

Q. What did it produce during the fiscal year prior? A. It is not set out separately.

Testimony of Lewis G. Wahmsley.)

Q. Isn't it set out in your annual report [271] separately?

A. No, it is not, it is under the farm service which includes fertilizing, insecticide, feed and seed.

Q. Did you have a way of breaking that down?

A. We break the sales down.

Q. Just a minute ago you testified for Mr. Laney that that wouldn't be ready for 30 or 45 days and that represented a percentage figure that I didn't catch of your operations that you said were substantial. What was that percentage figure?

A. Between 30% and 40% of your gross sales.

Q. Then for this fiscal period of 1953 where there was a decline from \$406,000 to \$235,000, a considerable portion of that loss or decline is represented by the loss of the feed mill during that period of time, is that not correct?

A. A portion of it is, yes.

Q. Then after the end of 30 or 45 days you expect to get the feed mill back into operation and the operations will return to their normal status, is that not correct?

A. We assume they will.

Mr. Trask: That is all. [272]

(Testimony of Lewis G. Wahmsley.)

Redirect Examination

By Mr. Laney:

Q. That I may understand Plaintiff's Exhibit 12 here, where you put down cash rebates contributed, explain what that means.

A. That is what I was talking about this morning. That is an adjustment in price due to competition, Mr. Laney.

Q. Is that any part of what you call the net margin?

A. No, it is not. That is not taken into consideration. That reduces the member sales by that amount.

Q. For the benefit of the Court you might go into that and explain.

A. Well, on 16-20 fertilizer, which is 16% ammonia nitrate and 20% phosphate, there is only one source of supply, which is Mathesan Chemical. They say you will sell it at a specified price or you don't get it. That price is \$3 to \$5 a ton more than we normally get on a ton of fertilizer in the margin that we compute that for our members, but in order to get that supply we add on and sell at the regular price. Then 60 days later we refund the difference between our ordinary margin and what the margin was [273] computed on that actual sales price.

Q. So that is no part of this margin?

A. No, it is not.

Mr. Laney: That is all.

Testimony of Lewis G. Wahmsley.)

Recross-Examination

By Mr. Trask:

Q. Irrespective of how you consider this, Mr. Wahmsley, in your own accounting, and there can be a difference as proper accounting method, can there not?

A. Oh, yes, that is very true.

Q. The margin that you have computed, speaking about the ordinary margin of these operations, is a margin that is computed as between the difference between the sales price of goods sold to consumers and the cost of that goods and the expense of operation. That is margin is it not?

A. That is right.

Q. Then with respect to insecticides and fertilizer, you sell your insecticides and fertilizer at the regular established market price and what you are testifying to, as I understand it, is that with respect to certain fertilizer there is a fair-trade level below which you can't sell that merchandise and still handle it, isn't that right? [274]

A. That is right.

Q. So you do sell it at that price and then you rebate the fertilizer differential between the sales price and the cost as a cash discount instead of handling it as your other merchandise on a revolving fund discount at the end of the year, isn't that correct?

A. No.

Q. Well, you do refund it?

(Testimony of Lewis G. Wahmsley.)

A. A portion of it.

Q. What portion?

A. Well down to your ordinary margin. If you desire \$5 a ton on fertilizer and you get \$8 or \$16 or \$20, you refund \$3 a ton.

Q. How much on this cash rebate distributed is represented by that rebate that you have just spoken of and the ordinary rebate that is handled as to other merchandise? In other words you have a figure here for February 28, 1952, of cash rebates distributed, \$16,962 or \$17,000.

A. That is on insecticide.

Q. Well insecticides and fertilizer is it not?

A. Yes, but the major portion of that is [275] insecticides.

Q. Is that handled any differently?

A. No.

Q. Your combined then is a figure of approximately \$17,000?

A. That is right.

Q. Then that figure represents the difference between the sales price at which those items of merchandise are sold and the cost of the merchandise to the consumers?

A. No, it is not either. That is the difference between—well, I can tell you very frankly on the insecticide, there is \$5 a ton rebate to the member in cash.

Q. And is that \$5—are those the rebates that total approximately \$17,000?

A. There is \$3 on fertilizers and \$5 on insect-

Testimony of Lewis G. Wahmsley.)

icides included in the figures that you are talking about.

Q. Is that the total margin on those items?

A. No, it is not.

Q. Where is the rest of the margin, is that included in the ordinary margins up above in those figures? A. Yes, it is.

Q. Then the \$3 or \$5, those two items [276] that you have just mentioned as the cash rebates going up to make the cash rebates, is a part of the difference—then let's put it that way, between the sales price and the actual cost, is that not correct?

A. That is right.

Q. And the rest of it is handled in the ordinary way and appears in your annual margins?

A. That is true.

Q. So this \$17,000 odd figure is still a part of the margin between the cost and sales price, but it is handled in a different way?

A. It is a special discount.

Q. But still a margin between cost and sales price, is it not? A. That is right.

Mr. Trask: That is all.

Redirect Examination

By Mr. Laney:

Q. But the sales price is raised by this \$5 in the one instance with the understanding that that is to be rebated? A. It is most certainly.

Mr. Laney: No further questions.

HARVEY SIMS

called as a witness by and on behalf of Defendants,
being [277] first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Harvey Sims.

Q. And are you in the employ of one of the
defendants that are involved in this litigation?

A. Southwest Co-Op.

Q. In what capacity are you employed there?

A. In the mill and insecticide.

Q. State whether or not you are the supervisor.

A. I was a production manager in the mill and
a labor foreman in the insecticide.

Q. Were you employed in that capacity during
the time when Mr. Held was supposedly with the
company there from April 1, 1952, to June 20 of
that year? A. I was.

Q. About how long have you been in the employ
of these companies or one of them?

A. Since 1936.

Q. That at that time was which company?

A. C. M. Martin Wholesale.

Q. That was the predecessor of this United?

A. That is right. [278]

Q. Predecessor of the Southwest Co-Operative
Wholesale. Now did you meet Mr. Held after he
came here? A. Yes.

Q. When did you first meet him?

Testimony of Harvey Sims.)

A. Well, I saw him—he had a meeting with me and Ivan Stoltzfus one time.

Q. When was that?

A. I don't know what date it was. A couple of weeks after he came down here.

Q. And what was that meeting about?

A. He just told us that he run a business and we look at reports and if anything was wrong he would ask us about it.

Q. Did he ever give you any directions as to how to operate or any suggestion?

A. No, he didn't say anything—he didn't say anything to me.

Q. How many times all told did you see him or did he see you? That is, this second occasion.

A. Well, when they was placing a man—changing him from one job to the other.

Q. That is taking a man from whom and giving him to whom?

A. Taking him off the trucks and putting [279] him out in the field as a salesman.

Q. Did he at that time in any way discuss with you or give you any discussions or directions about how to run the business?

A. We only talked about the man that time.

Q. And that was just taking an employee from your department and taking him to another department?

A. Right.

Q. Did he at any other time in any way communicate with you or inquire as to how your department was running or communicate with you as

(Testimony of Harvey Sims.)

to how to run it with any suggestions, anything of that sort?

A. No, that is the only two times. Of course I might have spoke to him a few times, but that is the only thing I can remember.

Q. Well, now at that department head meeting that some have spoken about, about the middle of May of 1952, did he ask you to that?

A. I wasn't in it.

Q. Did he ask you—invite you there?

A. No.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask: [280]

Q. Mr. Sims, how long have you been in charge of the shipping dock and office or that department that you are in now?

A. Oh, I would say 6 years.

Q. In other words, as I understand it, your department is getting merchandise loaded for shipment and seeing that it is shipped to the proper person, is that right?

A. Not only that. I am production manager.

Q. Production manager of what?

A. The feed mill.

Q. And you had that job as manager about 6 years, you say? A. I would say so.

Q. Prior to that time you kind of grew up in the business down there, you knew it pretty well?

Testimony of Harvey Sims.)

A. I wouldn't say that. I know my part of it.

Q. You know your part of it pretty well. You are still an employee down there, still doing the same job? A. Yes.

Q. And during the time he was there did you have any particular fundamental or difficult problems that were different from what they had [281] been during the 6 years you have been there?

A. No, I don't know.

Q. Everything went along pretty much the same on the 2nd of April after he came as it did on the 5th of March before he came, did it not, Mr. Sims? A. Yes.

Q. He didn't come down and change your method of operation or fire your employees or do anything to interfere? A. No.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Did he ever inquire or find out whether your department was running in a good fashion or a poor fashion? A. He didn't ask that.

Mr. Laney: That is all.

Mr. Trask: No further questions.

IVAN STOLTZFUS

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney: [282]

Q. Your name, please?

A. Ivan Stoltzfus.

Q. Mr. Stoltzfus, are you in the employ of one of these defendants that are involved in this litigation?

A. Yes, Southwest Co-Operative Wholesale.

Q. Now, what is your capacity there? What is your job?

A. I serve as manager of the sales floor and sales office in the feed and fertilizer department.

Q. That is of what?

A. Feed and fertilizer.

Q. And how about the insecticides?

A. Some insecticides too.

Q. How long have you been with this company approximately? A. 5 years.

Q. What about the sales warehouse and sales office, do you have anything to do with those?

A. Yes.

Q. In what capacity?

A. Manager of the employees.

Q. When did you first meet Mr. Held?

A. The first time I suppose was approximately 2 weeks after he came there when he met Harvey Sims and [283] he met the two of us.

Testimony of Ivan Stoltzfus.)

Q. What was the subject matter at that meeting?

A. He mentioned that he would like to operate business from reports and that he judged the progress of the business from those reports and if things didn't go well he started to ask questions.

Q. Did he ask you for any reports?

A. No, can't say that he did.

Q. Did he make any inquiries or find out as to whether you were running it well or poorly?

A. Not from me.

Q. Did you ever meet him again?

A. Yes, we held two meetings in his office, heads of the departments met in his office I think twice that I attended.

Q. Now, as to the first of those meetings about when was that?

A. Well, I don't know for certain.

Q. About how long was the meeting?

A. Probably half an hour.

Q. And did he give any advice or any suggestions or discuss with you how you were to operate your business?

A. We discussed mainly the general maintenance around the place. [284]

Q. General maintenance. Will you explain that first?

A. Well, I remember that we discussed grading of the grounds and cleaning up the place, making it look a bit more tidy.

Q. Talked about grading what grounds?

A. The grounds around the buildings.

(Testimony of Ivan Stoltzfus.)

Q. And then how long after that was the next meeting that you spoke of?

A. Probably two weeks.

Q. And that meeting then did you attend that?

A. Yes.

Q. And how long did that last?

A. About the same length of time, I would say.

Q. What was the subject matter of that meeting?

A. Well, it followed the same general lines. Mr. Held asked each of us whether we had any suggestions to make.

Q. And did you make any suggestions and did he follow it up and discuss it at all?

A. Well, there were a few suggestions made. I don't recall just what they were, but they were not [285] of importance in the operation of the business.

Q. Well, do you recall what it was he talked about?

A. I don't recall for certain except the maintenance of the grounds is all that I remember for sure.

Q. Well, now did he ever come there and familiarize himself with this work that you had charge of there, the feed and seed and insecticide and fertilizer business?

Mr. Trask: Object to the form of the question. This witness would have no knowledge of whether any person familiarized himself.

Testimony of Ivan Stoltzfus.)

Q. Did he while you were present or around here?

Mr. Trask: Same objection, it is the same question.

Q. Did he ever come there to the feed or the seed plant and make any inquiries of you about how it was run and being run?

A. No, he came there a few times, but there were no matters of importance discussed.

Q. How about the insecticide and fertilizer business? Did he make inquiries or become familiar with that?

Mr. Trask: Same objection. [286]

The Court: Same ruling.

Q. Did he make any inquiries about it?

A. Not of me.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask:

Q. You are still employed down there?

A. Yes.

Q. Mrs. McInerney asked you to come up here and testify?

A. Someone did. Mr. Sims asked me to come along, I really don't know who called.

Q. You did attend at least two staff meetings representing the department over which you spend most of your time? A. Two meetings.

Q. And those staff meetings, at those staff meet-

(Testimony of Ivan Stoltzfus.)

ings Mr. Held would go around and ask each one if they knew—if they had any suggestions or problems and invite their comments, is that correct?

A. That is right.

Q. And anybody that did have suggestions or problems, if they did would speak up and you would discuss it, is that the way you handled the meeting?

A. That is right. [287]

Q. And in addition he came down to your plant two or three times, you say? A. Two times.

Q. And you didn't keep any particular track of it as to the times he did come down or didn't?

A. No.

Q. You spoke of his comment that he was accustomed to checking the reports of the businesses of the departments and seeing how the departments were doing. Did your particular department make a report?

A. Not a written report, except, let me take exception there—except that he could familiarize himself with the sales invoices and such but there was no condensed written report.

Q. What is your particular feed and fertilizer department?

A. Yes, I am in insecticide sales, too.

Q. The reports of sales of the feed and fertilizer and seed department are all contained in broken down figures on the report of the entire operation, are they not? A. That is right.

Q. So he wouldn't have to come to you and look through the invoices to find out how much sales

(Testimony of Ivan Stoltzfus.)

our [288] department was doing, would he? He could check those, couldn't he, from the monthly invoices, monthly reports of the business, could he not? A. I would say so.

Mr. Trask: That is all.

Mr. Laney: That is all.

PAULINE McINERNEY

Called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. Pauline McInerney.

Q. Are you in the employ of these two companies that are defendants here?

A. Yes, sir, both of them.

Q. And how long have you been in the employ of these two companies that are defendants here? A. Since January, 1939.

Q. How long have you been in the employ of the Southwest Co-Operative Wholesale?

A. Since its organization March 1, 1944, and prior to that time in the employ of the Martin Wholesale, its predecessor.

Q. I believe it came out in the evidence [289] that you are the assistant secretary of both of these companies, is that correct?

A. That is correct.

Q. I will ask you whether you were the one who

(Testimony of Pauline McInerney.)

is accustomed to actually keep the minutes of the meetings of both companies.

A. That is correct.

Q. I will ask you whether you have produced the minutes books of both companies here.

A. Yes, sir.

Q. Which one of these is—well say the United Producers? A. The top one.

Q. We will come first please to the matter of this. Are you familiar with when Mr. Held was first communicated with? A. Yes, sir.

Q. That was by whom?

A. Mr. C. M. Martin.

Q. Have you the carbon copy of that letter to him? A. Yes, sir.

Q. I will call your attention to Defendant's Exhibit A and I will ask you to look that over and see if you recognize that as the letter you just spoke [290] of that Mr. Martin sent in the first communication. A. That is correct.

Q. When was it that you first saw Mr. Held as near as you can fix it?

A. The latter part of January.

Q. Of 1952? A. Yes.

Q. And then was he in any way employed during that time? A. He was not.

Q. And how long did he remain? Where did you see him?

A. I saw him about the office of the company at 1821 East Jackson and I saw him again at the

Testimony of Pauline McInerney.)

Saddle & Sirloin Club at a dinner which Mr. Smith gave for Mr. Held.

Q. That was in January?

A. That is right.

Q. And then when did you next see him?

A. I next saw him on March 6, 1952.

Q. Now, on March 6, 1952, state whether or not there was a board meeting of both of the companies.

A. There was a board meeting called for both the Southwest Co-Operative Wholesale and United Producers on March 6. [291]

Q. And were you present at some part of that meeting?

A. I was present at the beginning of the meeting, yes, sir.

Q. Was there to be some discussion about proposed employment of Mr. Held?

A. Yes, sir. At the time they started discussion on the proposed appointment of a manager, all people except the Board were excused.

Q. And was Mr. Wahmsley there?

A. Yes, sir, and he was likewise excluded.

Q. And you were excluded? A. Yes, sir.

Q. When the meeting was over did you see Mr. Held after it was over?

A. Yes, sir, Mr. Smith and Mr. Held came to my office after the meeting was over and Mr. Smith handed me a copy of the resolution which he stated had passed—had been passed at the meeting and on glancing at that I told Mr. Held that we were very

(Testimony of Pauline McInerney.)

happy that he was going to be with us and both he and Mr. Smith said it had not been settled, that he had this prior commital in the east, that he had to be released from it, and he would let us know by March 15 whether he would accept it or not. [292]

Q. About the 15th? A. Yes.

Q. And then I will ask you whether that minute or that resolution that you saw was copied verbatim in the minutes of this meeting of March 6, 1952.

A. An exact copy was entered into the minutes.

Q. Was it in the minutes of each company?

A. Yes, sir.

Q. Calling your attention to the minutes in this book, you say?

A. That is United Producers and Consumers.

Q. Will you find the minutes of that meeting please. Now, as to the portion of the minutes that has anything to do with Mr. Held will you read that?

A. Motion was made by Klick, seconded by Mr. Collier and passed unanimously that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out terms of employment.

Q. That is the resolution that was handed to you by Mr. Smith in the presence of Mr. Held?

A. That is right.

Q. As to the minutes of that same date, in the other company—this is which company? [293]

A. Southwest.

(Testimony of Pauline McInerney.)

Q. Will you look up the minutes of that and then as to the minutes of the meeting of March 6, 1952, of the Southwest Co-Operative Wholesale, I will ask you to read all portions of it that have anything to do with Mr. Held.

A. Motion was made by Mr. Collier, seconded by Ralph Ashby and passed unanimously that Mr. Smith and Mr. Wahmsley be authorized to employ Mr. Held as general manager and work out the terms of employment.

Q. That was on the evening I believe you said of the 6th that this happened? A. Yes, sir.

Q. Now, I will ask you whether you saw Mr. Held and Mr. Smith at any time the next day?

A. I saw Mr. Smith in the afternoon about 2:00 o'clock and he asked me if Mr. Held had called. He said that Mr. Held was going to meet with Mr. Martin at the Adams Hotel that day and going to call him and let him know when he would like to be picked up and come out to the company and Mr. Held called approximately I would say 2:30 or 3:00 and Mr. Smith did pick him up and bring him to the offices of the company; at the time they discussed among them, just the two of them, their [294] own business. I do not know about that.

Q. Did you see them along about 5:30 of that afternoon of the 7th? A. They came in.

Q. Just yes or no, whether you did.

A. Yes.

Q. Had you seen what they were doing meanwhile? A. No, sir.

(Testimony of Pauline McInerney.)

Q. Go ahead and tell what happened then along about 5:30.

A. They came in about 10 minutes of 5:00, some-think like that.

Q. You say they?

A. Mr. Held and Mr. Smith and stated they were going to go to the hotel to pick up a copy of the contract which Mr. Held stated his lawyer in Des Moines had drawn up and that they would be back and would like me to remain in order to work with them on this contract and they returned about 5:15.

Q. And then what happened?

A. They had this contract form which, as I say, Mr. Held stated his lawyer in Des Moines had drawn up. Mr. Held dictated two changes in the contract and I typed the contract from the [295] contract which he presented, adding the note which he had dictated.

Q. I will show you Defendant's Exhibit D in evidence. Did you hear the testimony of Mr. Held to the effect that that was the copy of the contract that he had at that time? Did you hear his testimony about that?

A. Yes, sir.

Q. Is he correct in that?

A. That is not true. I had never seen that contract until yesterday.

Q. What was the size of the contract that he had that he said his lawyer had drawn up?

A. It was a one-page document which was type-written and not printed.

(Testimony of Pauline McInerney.)

Q. I will ask you whether you have your stenographic notes showing what they dictated and what you wrote and what you copied from that?

A. Yes, I have.

Q. When that was drawn up then I will ask you if that—if what you drew up was this form of contract, one copy of which was introduced in evidence as Plaintiff's Exhibit 1. That is the contract involved in this litigation? A. Yes, sir. [296]

Q. Then when that was drawn up go ahead and state what further was said and done.

A. The contract was typed from the copy which was brought with the additions which had been dictated. Mr. Smith signed two copies, it was typed in triplicate, he signed two copies and it was the understanding between Mr. Smith and Mr. Held—

Mr. Trask: Objection. Let's just get what was said.

Q. What did they say?

A. It was stated that Mr. Held would take two copies of the contract with him which had been signed by Mr. Smith and that he be released from his commitment in the east, that he would let Mr. Smith know by the 15th whether or not he would accept the employment and would at that time sign the contract.

Q. By the 15th of what month?

A. March, 1952.

Q. And then what was your accustomed quitting time at that time? A. 5:30.

Q. This was made from 5:15 on, was it?

(Testimony of Pauline McInerney.)

A. Yes, sir.

Q. And was Mr. Wahmsley there at all? [297]

A. Mr. Wahmsley was not there.

Q. I will ask you to state if you know, whether he was available at his office, or do you know?

A. I assume that he was. We can usually reach him when we need him.

Q. Did Mr. Held mail that contract back by the 15th of the month? A. No, sir, he did not.

Q. Did you later see the contract?

A. Yes, sir.

Q. And where was it sent to?

A. It was sent to Mr. Smith's residence in Glendale, Arizona.

Q. If you know, state whether it arrived there before or after his death.

Mr. Trask: Object. No possibility of the witness knowing unless she was present.

Q. If you know.

A. It arrived after his death.

Q. Now, I will ask you to state whether you were at his house on the day of his death.

A. I was at his residence twice on the day of his death.

Q. When were you first there? [298]

A. I was there approximately 10:30 or 11:00 in the morning.

Q. Was this contract or any letter containing it there at that time? A. It was not.

Q. And then did you come back later?

Testimony of Pauline McInerney.)

A. I returned to his residence that evening approximately 7:00 o'clock.

Q. Did you have information that this contract was supposedly signed and in the mail?

A. Yes, sir, Mr. Smith had told me that it was.

Q. And then when you came back later was the contract there?

A. Yes, sir, it was there at 7:00 in the evening.

Q. Had it come through the mail?

A. Yes, sir.

Q. Had the envelope containing it been opened?

A. No, sir.

Q. And then what was done with the contract?

A. The contract was filed at the office.

Q. Did you bring it back to the office?

A. Yes, sir. [299]

Q. Did you at that time have any knowledge of whether or not Mr. Wahmsley had helped to work out the terms of this contract?

A. No, I did not. I knew that he was not there at the time that it was prepared and written.

Q. And then did you have some communication with Mr. Held after Mr. Smith's death?

A. Yes, sir, I sent him a telegram the afternoon of Mr. Smith's death stating that he had died and the funeral would be held on a certain day.

Q. Did he communicate with you?

A. Yes, he called on the telephone the following day, said that he would not be able to be here because he was planning to leave Des Moines the day

(Testimony of Pauline McInerney.)

of the funeral and that he would be here to start work on the first day of April.

Q. Then did he come out?

A. Yes, sir, he arrived the day before, the first day of April, I guess the 31st.

Q. Did you see him on the first day of April?

A. Yes.

Q. I will ask you whether you were there at the office of these companies during the entire period [300] from April 1, 1952, until June 20 of 1952?

A. Yes, sir, I was there every day from 8:00 in the morning until almost 6:00 at night with the exception of Saturdays and Sundays.

Q. Now, as to the first week after he came there what did Mr. Held do and say?

A. The first week he was there—the 1st was on Tuesday, I believe, and Mr. Held was in the office most of that week. However, he was in his office with the door closed, he did not take any active part in the business except the board meeting he attended on the 3rd day of April.

Q. On the 3rd day of April he did attend the board meeting?

A. Yes.

Q. And I will ask you to state whether at that board meeting of April 3 the minutes of the meeting showing about his proposed employment were read and approved?

A. Yes, sir, the minutes were read and approved.

Q. Then what next did he do? Go ahead and tell what he did and where he was, if you know.

(Testimony of Pauline McInerney.)

A. He stated on Thursday or Friday of that first week that he had planned on going to the [301] coast the following week and would be gone all week, that he was going to call on various members of the Southwest Co-Operative Wholesale and attempt to build up the sales volume of those companies with the Southwest on equal volume with the United if it could be done.

Q. And what did you tell him about that?

A. I told him the type of business that each of those members operated, that two of them were primarily market organizations for the purpose of marketing seed and hay and that the principle supplies that they handled were fertilizer and insecticide, that the member that was located in San Diego operated a feed mill only, that that mill was far larger than ours and that they had never bought any from us with the exception of a few cars of barley during harvest time.

Q. And did he go on this trip then?

A. Yes, he did and was gone the entire following week.

Q. Now, after he returned I will ask you whether you had any talk with him about whether or not you were correct in telling him about it.

A. Yes, sir, he said that from his observations of the company that there was not a great deal of business that we could do with them. [302]

Q. Now, did you ever have any talk with him about Yuma or did he make any remarks to you or not?

(Testimony of Pauline McInerney.)

A. No, sir, we discussed the fact of the farming development in the Yuma Mohawk area and briefly—and he merely stated that he was interested in locating a farm here and wondered what locality would be the best to locate in. That was the only conversation we ever had except after he came back he did say that he had stopped in Yuma and visited this Yuma marketing co-operative which was located there. However, they have no connection with either of our companies.

Q. Then what did he do the next week?

A. The following two weeks he was out of the office the major portion of the day except perhaps an hour during the day and he told us that he was calling on the Board of Directors.

Q. Told you he was calling on the Board of Directors for a couple of week? A. Yes.

Q. After that what did he do?

A. I have no accurate knowledge of what he did. I don't know what it was except that he was in the office very little of the time, between 30 minutes and an hour each day. [303]

Q. You have brought it up to about what time now? From then, we will say, up until he went east. That I believe was about May 25, was it?

A. Yes, it was his practice during all of that time to visit the office perhaps half an hour to an hour a day, usually in the morning he would be there around 8:00. Once in a while he would come in in the evening once in a while.

Testimony of Pauline McInerney.)

Q. Would he leave word with the switchboard girl?

A. He did not and I made inquiry of his secretary and she did not know either.

Q. Can you give us some idea how frequently that would occur that you didn't know where he was when he was gone?

A. That would occur several times each day.

Q. That is, that they would make inquiries?

A. Yes.

Q. Then was there a board meeting held sometime the latter part of May? That is May 23 or 25 or someplace along there?

A. It was the latter part of May. I know that it was the last Friday. The exact date I don't remember. [304]

Q. Could you refresh your memory and tell us the exact date when that board meeting was? And I am referring to a board meeting just before he left for the east.

A. I don't believe this was inserted. I have it in my other file there—May 23.

Q. May 23. Now, then do you know of your own knowledge or not where he went then or did he tell you anything about where he was going?

Mr. Trask: At what time?

Q. At any time after this. Did he attend this board meeting of May 23? A. Yes, sir.

Q. And then did he state to you at any time after that where he was going or not?

(Testimony of Pauline McInerney.)

A. Yes, sir, about 5:00 he said that he was going back to Des Moines.

Q. And that was for what purpose?

A. Bring his family to Phoenix.

Q. And then were you present at this meeting that has been spoken of as an informal meeting of May 27? Were you present at that?

A. Yes, sir.

Q. Did you keep minutes of that or not?

A. No, sir, it was not an official meeting of [305] the Board of Directors.

Q. Who were present at it, if you remember?

A. Mr. Essley, Mr. Holly Smith, Mr. Emil Rovey, Mr. Ralph Ashby, Mr. Jack Click, Mr. I. F. Collier, Mr. John Biggs, Louis Wahmsley and myself.

Q. Now, I will ask you whether or not at any time previously to that, you did endeavor to contact Mr. Click?

A. Mr. Click was at the meeting.

Q. At the meeting of the 27th. I was mistaken. I was thinking of some other meeting. Is that the meeting as a result of which there was some telegram sent? A. Yes.

Q. Calling your attention then to the telegram which is in evidence as Plaintiff's Exhibit 2 stating "Question is raised as to legality of your contract of employment, therefore I suggest that you defer moving your family until you hear further from Board of Directors" and signed D. O. Essley. Did you type that telegram or not?

Testimony of Pauline McInerney.)

A. No, I believe this is a draft that you had drawn up and I did telephone it to the telegraph office.

Q. You telephoned it to the telegraph company. That [306] was the one he got, I see. Calling your attention to Plaintiff's Exhibit 3 in evidence, his reply to that in which he said "You are advised that my contract entirely legal and I am continuing my employment in accordance with its terms." Signed Ralph W. Held. Was that received at the office in due course? A. Yes, it was.

Mr. Laney: May it please the Court, I want to go on to another subject. Would your Honor want to adjourn at this time?

(The regular evening recess was taken.) [307]

Mr. Laney: I ask to withdraw this witness for a moment for a brief other line.

The Court: All right.

HERBERT F. HOLMES

Called as a witness by and on behalf of Defendants,
being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Herbert F. Holmes.

Q. And what is your business?

A. Field supervisor for the Southwest Co-Operative Wholesale.

(Testimony of Herbert F. Holmes.)

Q. How many men or sub-supervisors do you have under you? A. Three.

Q. What title do you give them?

A. They are called area managers.

Q. What area do you serve in your capacity as head field man?

A. Wherever the Co-Op operates throughout the state.

Q. And were you employed in that capacity April 1, 1952, through June 20 of that year—that is [308] the time when Mr. Held was manager of the company? A. I was.

Q. About how long have you been employed by the company? A. A little over three years.

Q. Now, about when was it that you first met Mr. Held?

A. About 2 or 3 or 4 days after he took over active management.

Q. How much time did he spend on the field?

Mr. Trask: The witness can know how much time he spent with him, but not in the field.

The Court: He couldn't answer that.

Q. Did he spend some time in the field within your knowledge? A. Oh, yes.

Q. Will you relate what that time he spent in the field was, naming the first and going on?

A. Well, as I recollect one of the first things was a tour through the Glendale-Litchfield area where we visited three different Board of Directors of the organization.

Q. What was done at that trip?

Testimony of Herbert F. Holmes.)

A. I wasn't present at all. That is, Mr. Held was talking to one of them. Sometimes I was [309] present, sometimes I wasn't. I would wander away maybe and inspect the field, but as I remember the conversations it was with regard to the plans of the organization.

Q. That took how long out of his office? Was it one day or two days or more?

A. That was one day in that area.

Q. And then what was the next trip, if any?

Mr. Trask: May we have the time established, Mr. Laney. I didn't get the time on that trip.

Q. Can you fix the date?

A. I can't recall the date, no.

Q. Were there any cotton chopper demonstrations?

A. Yes, there was a cotton-chopper demonstration scheduled, one day we were in Chandler in the morning and Buckeye in the afternoon and Mr. Held was present for those.

Q. That was one day, was it?

A. That was on the same day, yes.

Q. Then was there any other cotton-chopper demonstration?

A. There were other cotton-chopper demonstrations, but I don't recall that both of us were present. [310] I wasn't present at the one at Glenlale, I know.

Q. That was another day. Then did you ever make a trip to Casa Grande with Mr. Held?

A. Yes, we took a trip to Casa Grande and

(Testimony of Herbert F. Holmes.)

visited with the area supervisor in Pinal County and returned through the area from Casa Grande, Coolidge and through the Queen Creek area back here and stopped and talked with at least one farmer that I know of.

Q. That was who?

A. That was Mr. Hanna—at least one.

Q. And did that take one day or more?

A. That was on one day, the biggest part of one day.

Q. And then was there any trip to Safford?

A. Yes, we left Prior early one morning and spent the entire day in Safford. Now, I believe that there were two.

Q. You think there were two days in Safford?

A. Yes, the reason for that is I go down there frequently in the summer and I don't exactly recall, but I definitely recall coming into Phoenix from two different directions.

Q. And then was there some trip out to inspect some barley field?

A. Yes, we were out together to inspect a [311] barley field several miles west of Phoenix.

Q. And now, were there any other trips that Mr. Held made out of the office with you as head of the field man—supervisor—other than those that you have mentioned?

A. We were in the field, remember one day at the conclusion of a Saturday insect school—that was on one day and he attended most of those of which I believe there were four.

(Testimony of Herbert F. Holmes.)

Q. Those were on Saturdays. Well was the office closed or open on Saturdays?

A. This particular school was held not in the office.

Q. I know, but if you know state whether or not the offices of the company were closed on Saturdays.

A. The offices of the company, the way you put it, yes. We didn't normally work. That is our force didn't normally work on Saturday.

Q. Then were there any other times that he was on field trips with you as head?

A. I don't recall any other times. I do recall another time. We did visit, go down and visit the county agent.

Q. Where was that? [312]

A. At 1201 West Madison.

Q. Here in Phoenix? A. Yes.

Q. What did you do there?

A. Discussed the general agricultural picture with the county agent.

Q. How much time did you spend out of the office on that trip?

A. Probably 2 or 3 hours, as I remember. As I recall right now, that is the extent of being out in the field.

Mr. Laney: That is all.

(Testimony of Herbert F. Holmes.)

Cross-Examination

By Mr. Trask:

Q. You say that he worked on Saturdays attending field demonstrations with field men?

A. Yes, we operated an insecticide school for a great number of summer men which we held on Saturdays and he attended.

Q. He attended those meetings?

A. Yes, sir.

Q. Was that on one Saturday or several?

A. I believe it was a total of four Saturdays.

Q. Do you recall then—as a matter of fact you didn't keep any pencil and note book time sheet of the times that you were out with Mr. Held or out on these other trips, did you? [313]

A. Not as such, but I kept a diary which went up in the fire.

Q. You are just testifying here from memory, though, the best you can? A. That is right.

Q. Do you recall attending a cotton meeting with Mr. Held at the Westward Hotel one day?

A. Oh, yes, definitely.

Q. That was another day actually from morning until most of the afternoon, was it not?

A. Yes.

Q. That was on company business, was it not? Do you remember going to Dr. Roney's office with him to discuss insecticides and insects with respect to cotton?

(Testimony of Herbert F. Holmes.)

A. Yes, I attended two, I believe it was a two-day session that Dr. Roney held. That was separate. Also at this visit where I mentioned we went to the county agent's office I think we included Dr. Roney in that.

Q. In that one too in addition to the insecticide school—in all of these trips that you have mentioned, they were on company business and company affairs, were they not, Mr. Holmes?

A. Yes.

Q. All of them Mr. Held took an interest [314] in the business at hand and the company affairs at that time? A. Yes, sir.

Q. Seemed to know and understand the nature of the problem and what was involved generally?

A. Well, you say generally, yes—technically he was interested in our agriculture.

Q. With respect to some phases of the cotton he wasn't familiar with it, having been raised on an Iowa farm, as someone would have been who had been raised in Arizona, was he?

A. That is right.

Q. He was interested in learning and worked with you in these affairs with you, did he not?

A. Absolutely.

Q. Going down the list of these various trips, times, the day you went through the Glendale-Litchfield area and met the Board of Directors, do you recall the time of the month that was?

A. I cannot recall.

Q. How about the cotton-chopper demonstration

(Testimony of Herbert F. Holmes.)

in Chandler and Buckeye? Do you remember the dates and times of those?

A. No, I can't. Not from memory, I can't.

Q. You mentioned that there were other [315] demonstrations held and that you didn't attend the demonstrations, is that correct?

A. That is right.

Q. You don't know then whether or not Mr. Held might have attended the others in your absence? A. I don't know, no, sir.

Q. You can't fix the date of those other demonstrations either. A. No.

Q. Those cotton-chopper demonstrations were for the purpose of demonstrating to the farmers a piece of equipment that the co-op was interested in selling, is that right? A. That is right.

Q. The trip to Casa Grande that you said took a whole day, where you talked to Hanna and others, do you recall the date of that, approximately what month?

A. That was—that would be late April or May, late April or early May.

Q. The trips to Safford, you say there were at least two of those?

A. I believe there were two, yes.

Q. Those of course took all day. Those were on company business? [316] A. Absolutely.

Q. The trips to inspect the barley field, those were on company business? A. That is right.

Q. As a matter of fact everything you testified about was on company business, was it not?

(Testimony of Herbert F. Holmes.)

A. Exactly.

Q. Do you remember the four Saturdays working on field demonstrations? Do you remember whether those were in April or May or about when they were?

A. Yes, those would have been in May. There may have been one the last Saturday in April.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Counsel referred to those as field demonstrations. What were they?

A. It was insecticide school, part of which was held in various conference rooms and then moved out into the field, not on every occasion.

Q. They were held in conference rooms where?

A. Generally we selected a private dining room so that we could start in the morning and have our meal and uninterruptedly go on with our [317] school.

Q. Who was conducting that school?

A. I was.

Q. That was on Saturdays? A. Yes.

Q. Counsel asked you if there were other demonstrations. I believe you stated the one at Glendale you were not present at?

A. No, there were a total of four demonstrations.

Q. There were?

A. On three different days of which I attended

(Testimony of Herbert F. Holmes.)

three demonstrations. I did not attend the Glendale demonstration.

Q. Those were demonstrations of the cotton-chopper? A. Cotton-chopper.

Recross-Examination

By Mr. Trask:

Q. Do you remember some meetings at the Phoenix Union High School attended by you and Mr. Held among others?

A. Yes, when you ask me if we met Dr. Roney that was the statement I meant that there were two days that he attended those all-day sessions.

Q. At Phoenix Union High School? [318]

A. Phoenix Technical School.

Q. Those were with reference to company business? A. Yes.

Q. It concerned entomology and the control of insects and cotton fields and what type of insecticides would best control and the insecticides that your company sold, is that right?

A. That is right.

Mr. Trask: That is all.

Mr. Laney: That is all.

LEHI B. PALMER

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Lancy:

Q. What is your name, please?

A. Lehi B. Palmer.

Q. What is your occupation or position?

A. Area supervisor or area manager, whichever title they want to call it.

Q. For which company?

A. United Producers and Southwest.

Q. I will ask you whether you were employed in that capacity from April 1 to June 20, of [319] 1952?

A. Yes, sir.

Q. And what area did you serve?

A. Call it the east side, the south side. That is east of Phoenix.

Q. You heard the testimony of Mr. Holmes I suppose, did you?

A. Yes.

Q. Now as to the cotton chopper demonstrations that he spoke about, did you attend some of those?

A. Yes, sir.

Q. Which?

A. I attended the one at West Chandler and I recall another one we had on the east side of Chandler. In fact it was the very first one that was held. It was actually before the cotton was even up. We used some blank rows in which to check and test.

Q. Were those held on the same day?

(Testimony of Lehi B. Palmer.)

A. No, that was a separate one entirely.

Q. What about the one at Buckeye?

A. I did not go.

Q. Was there any other time that you saw Mr. Held on any field trip?

A. At the same meetings and field demonstrations that Mr. Holmes mentioned. [320]

Q. Just those?

A. I did see him the one time when he was returning from someplace, where I don't know, but I did see him the one time while I was checking cotton fields.

Q. Was that on the day of any of these demonstrations you told about? A. No, sir.

Q. Your job was what?

A. Well, in the summertime we had several men working under us and we supervise those men during the balance of the year. Of course, we are calling on farmers and selling our products, whatever it may be.

Q. That was in the sale of what products?

A. Of everything that the company has to sell.

Q. What are the products?

A. Feeds, livestock, insecticides, lumber, furniture.

Q. Did it sell the products that were handled in the lumber yard or hardware department or any of those other departments? That was the other company, was it?

A. You are referring to what I would sell?

Q. Yes. [321]

Testimony of Lehi B. Palmer.)

A. Yes, we would sell everything that was down here that anyone would ask for.

Q. Well did you spend any time at the hardware store or the lumber mill or the other departments there, the retail stores?

A. During what time?

Q. During the time we are talking about?

A. Only to come in occasionally to pick up merchandise or to get reports.

Q. Other than those Mr. Holmes has mentioned and you have mentioned, were there any other occasions you saw Mr. Held on any field trips?

A. Not away from the office, no, that I can recall at the time.

Mr. Laney: That is all.

Cross-Examination

By Mr. Trask:

Q. Mr. Palmer, then on most of the occasions that Mr. Holmes testified about you, or some of those, you were present too, is that correct?

A. Yes.

Q. And some of them you were not present?

A. That is right.

Q. And some of these cotton chopping demonstrations you testified about when Mr. Held was present Mr. [322] Holmes was not present, is that right?

A. At the one, yes.

Q. At least one. Do you recall an occasion when you and Mr. Held examined a cotton field south of Mesa one night about 7:00?

(Testimony of Lehi B. Palmer.)

A. That was the time I was referring to a while ago when I stated that I met him one time out in a cotton field.

Q. Coming home from Mesa?

A. Yes, I had—I was inspecting the field and he was coming home from somewhere.

Q. At least he met you there and went over the field with you at 7:00 in the evening? A. Yes.

Q. You were there on company business?

A. Yes.

Q. He was there on company business to learn from you and to investigate, check for the company, was he not?

A. We discussed the problems of course that I have in the field.

Q. At that time? A. Yes, sir.

Q. During all of these occasions that you worked with him he seemed interested in the company [323] business, did he not? A. Yes, sir.

Q. Trying to learn and find out and acquaint himself with company affairs and the problems of this area? A. Yes.

Q. Do you recall Mr. Held attending an entomology school for two or three days in April or May at Phoenix Technical School? A. Yes.

Q. Do you recall attending several meetings of the field men in the upstairs office of the field mill down at the plant where you had some problems with lumpy insecticides or lumpy fertilizer trying to work out that problem?

A. We definitely did, yes.

Testimony of Lehi B. Palmer.)

Q. And Mr. Held was there at that time?

A. He was, yes.

Q. Worked with you and Mr. Holmes and the rest of them on that problem? A. Yes.

Q. That was an important problem of the company at that time? A. Very definitely.

Q. He helped work out a contract with the [324] held men in the manner in which they should carry on their duties and how the territory should be divided and the details of that, do you recall that?

A. Yes, sir.

Q. Mr. Held as manager helped work out those contracts? A. Yes.

Q. That was an important part of the sale of insecticide and fertilizer for the company throughout the territory? A. Yes sir, it was.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. This matter that counsel brought out from you about some lumpy material, what was that?

A. That is your insecticides. The year before we had had trouble due to things—not our fault at the plant as far as we knew and we were just getting ready to start a new season and we wanted to make sure that our material was free and that it was good when we started the season.

Q. Where was it that you did what work you did on that?

(Testimony of Lehi B. Palmer.)

A. Upstairs in the mill office was where we [325] first came in and we talked about it and discussed it because we were having——

Q. That was at the plant?

A. At the plant, down at the feed mill plant it is. Then we made one or two trips over into the insecticide department where we obtained samples of our materials. We took them back, tested them and examined them and one of the boys was asked to go out and buy a sample of other dust and bring it in. Then one meeting we first brought up the problem, the next meeting we brought up the dust and went over to the plant and got our samples, then the meeting was postponed because Joe Huron wasn't there. He was asked to come in and sit in on this final meeting that we had as far as eliminating our lumpy dust.

Q. That was all there at the plant?

A. Yes.

Q. And Mr. Held was there? A. Yes, sir.

Q. Now as to the contract with the field men that opposing counsel asked you about, was that worked out before Mr. Held came here?

A. They had had it typed out and made up, yes, sir, but it was gone over and adjusted or changed in his presence at his request. [326]

Q. And who had worked that out?

A. That I couldn't say. I presume that Mr. Wahmsley, our man at the plant, was the one who worked it out.

Mr. Laney: No further questions.

JOHN N. KLEINZ

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

by Mr. Laney:

Q. What is your name, please?

A. John N. Kleinz.

Q. What is your position?

A. I am in charge of the west side district.

Q. For this same company? A. Yes.

Q. Which company is that?

A. I believe I am paid by the Southwest Cooperative.

Q. Being supervisor of that district what do you do?

A. Well, I am in charge of insecticide, fertilizer and anything that we keep on that side.

Q. And you sell to whom, to the farmers?

A. To the farmers, yes. [327]

Q. You heard the testimony of Mr. Holmes here, did you? A. Yes.

Q. And did you know of any other field trips that Mr. Held ever made other than those that Mr. Holmes and Mr. Palmer testified about?

A. The only field trips that I would know about were the ones that I was on. He was out in Buckeye one day, another time in Glendale.

Q. And the one at Buckeye, do you know whether that was the same day as the one at Chandler?

A. I believe it was. They shipped the equipment

(Testimony of John N. Kleinz.)

from Chandler to Buckeye and got there in the afternoon.

Q. And the one at Glendale, who else was present there? A. Besides Mr. Held?

Q. Yes, which foreman or supervisor?

A. Well, I was there. That is all I could account for on that. Mr. Held was there too, of course.

Q. And that was a demonstration of what?

A. A cotton chopper.

Q. Do you know whether that was the Glendale one that was spoken of by Mr. Holmes or not? There [328] was one in Glendale.

A. He did refer to the Glendale demonstration.

Q. Was there just the one Glendale demonstration of that?

A. There was just one demonstration in Glendale, yes.

Q. Was there any other time that Mr. Held was out on your area during this time from April 1 to June 20?

A. I can recall the time when Mr. Held and Mr. Holmes and myself went out to make an adjustment on barley—grain.

Q. Was that the barley trip that was testified about by Mr. Holmes, the same matter or one of them? A. Yes, I believe it is.

Mr. Laney: That is all.

Testimony of John N. Kleinz.)

Cross-Examination

By Mr. Trask:

Q. I don't recall, my notes don't show Mr. Holmes testifying about any trip out to make any adjustment on barley, Mr. Kleinz. When was that?

A. Well, now, that is a good question. I don't know when but Mr. Holmes and Mr. Held and I went out to see Trombley on adjustment on [329] train.

Q. What was the occasion for that trip?

A. There was a complaint on it and it was in my area. We sold them barley and they got 21½ orders of barley and the rest was oats and we were trying to determine the cause.

Q. Did you request Mr. Held to go out there with you as the manager to help work out the problem?

A. I requested Mr. Held through Mr. Holmes who was my superior.

Q. And he did go out there on that trip with you?

A. Yes, we talked it over beforehand and then went out.

Q. Did he take an interest in the affairs of the company on this occasion and other occasions when you were out with him working out problems?

A. Yes.

Q. This particular trip on the barley, how many times did you go out to see Mr. Trombley?

(Testimony of John N. Kleinz.)

A. I went out with Mr. Held and Mr. Holmes only once that I can recall.

Q. You don't remember when Mr. Held went out on any other occasion at all?

A. No, I wouldn't know.

Q. Was that problem adjusted [330] satisfactorily?

A. I didn't hear any more about it after that.

Q. And you likewise were familiar with a great many of these other trips that Mr. Palmer and Mr. Holmes have testified to. You were along on some of those too, were you not?

A. I was on one in Casa Grande and one, maybe two, in Chandler, yes.

Q. Mr. Held, so far as you could observe in these trips, displayed a good general knowledge of agriculture and farming problems, did he not?

A. I would say so, yes.

Mr. Trask: That is all.

Mr. Laney: That is all.

IRVIN D. TWAY

called as a witness by and on behalf of the Defendants, being first duly sworn, testified as follows:

Direct Examination

By Mr. Laney:

Q. What is your name, please?

A. Irvin D. Tway.

Q. What is your position?

A. Area manager for Pinal County.

(Testimony of Irvin D. Tway.)

Q. That is for the Southwest Co-Operative Wholesale? [331]

A. And the United Producers and Consumers.

Q. You are area supervisor of what?

A. Mr. Holmes is my immediate supervisor. I am an area manager for Pinal County, in charge of sales.

Q. In the sale of what?

A. Sale of all the products that our company handle.

Q. That which company has?

A. United Producers and Consumers Co-Operative.

Q. Well, what is it that you sell mostly?

A. Insecticides, fertilizers, farm supplies.

Q. Were you in that position during the entire time that Mr. Held was supposed to be manager?

A. Yes, sir.

Q. Did you ever see him on any field trips or trip? A. Yes, sir.

Q. When, as near as you can fix it was that and where did he go?

A. On some of the trips that Mr. Holmes has mentioned I saw him on some of those. I wasn't on all the trips that the other boys made and one other time he and Mr. Holmes came to Casa Grande and I saw him on that time. [332]

Q. Was there any trip that he made into your field that you know of other than those that have been testified to? A. No, sir.

Q. What did he do on that trip?

(Testimony of Irvin D. Tway.)

A. As I recall, Mr. Holmes stopped by and met them at the office down there in Casa Grande and he and Mr. Holmes stopped by and visited with me for a little while, an hour or so, I imagine, and asked how everything was getting along and so forth and then they took off and went on to make some other contacts for farmers.

Q. Spent about an hour with you, you say?

A. I would imagine something like that.

Q. What did he come for?

A. Wanted to know what the situation regarding insecticides and fertilizers were down there.

Mr. Laney: That is all.

Mr. Trask: I have no questions.

PAULINE McINERNEY

called as a witness by and on behalf of the Defendants, having been previously sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Laney: [333]

Q. Now, Mrs. McInerney, there has been talk of so-called informal meetings of the Board of Directors that was called—held on May 7, 1947. Do you know why that was called?

A. That meeting was called by Mr. Essley for May 27.

Q. May 27?

Testimony of Pauline McInerney.)

A. And he came into the office on Monday, which I guess would be the 26th, as he usually did, he would come in two or three times a week and check and see if things were going all right and asked about Mr. Held and I told him that he had gone east, stating he was going to bring his family here and that I had assumed he had checked with Mr. Essley and Mr. Essley stated at that time——

Mr. Trask: I am going to object to conversation between this witness and Mr. Essley not in the presence of defendant, hearsay.

The Court: All right.

Q. Then were all the members of the Board that you could reach notified of a meeting?

Mr. Trask: I object to that question, it calls for a conclusion whether they were notified. She can testify what she did or knows about it.

The Court: She can testify as to what [334] she knows.

Q. What do you know?

A. I notified all of the Board with the exception of Mr. Dana Fisher who lived in Glendale and we called the meeting on Tuesday morning. That would not have given him sufficient time to get over here and I had called the residence of Mr. Knox the week previously on Wednesday to notify him of the meeting for that Friday and at that time his mother answered the phone——

Mr. Trask: I am going to object to conversation not in the presence of defendant.

The Court: Yes.

(Testimony of Pauline McInerney.)

Q. Were you able to notify Mr. Knox?

Mr. Trask: Same objection, if the Court please.

The Court: She doesn't know whether she was or not. She called his home and talked to his mother.

Q. Counsel asked about that meeting, what was discussed at that meeting of the Board?

A. The contract——

Mr. Trask: Is this the meeting where Mr. Held was present?

Mr. Laney: No, this was the informal [335] meeting of May 27.

Mr. Trask: Object to the testimony regarding that meeting. It is self-serving, not in the presence of this defendant. He is not bound by it. Hearsay.

The Court: I think so.

Q. When was the next board meeting held?

A. A special meeting was called for June 9.

Q. And what was the purpose of that meeting?

A. To consider a manager's contract.

Q. And who were present at that meeting?

A. The board members were there, I believe, with the exception of Mr. Dorman and after the meeting had started the employees that ordinarily were at the Board meeting were excused.

Q. Were you excused? A. Yes, sir.

Q. When was the next board meeting held?

A. The next board meeting was called for June 20.

Q. What was the purpose of that?

(Testimony of Pauline McInerney.)

A. Called for the purpose of dismissal of the manager.

Q. Did you keep the minutes of that meeting?

A. I did. [336]

Q. There was introduced in evidence a letter from Mr. Essley on behalf of each of the companies notifying Mr. Held of the resolution there and one of those letters is Plaintiff's 4 and reading, "Mr. Emil Rovey made motion that in view of the fact that the members of the Board are of the opinion that Mr. Ralph W. Held was never legally employed and the illegality of his employment has only recently been discovered by the Directors and in view of the fact that he has never fulfilled the terms of the contract, that his purported employment be declared at an end. Motion seconded by Mr. Ralph Ashby and passed."

Is that in that letter a true copy of the resolution that was passed at that meeting?

A. I believe so.

Q. Well, did you write that out? A. Yes.

Q. Is it a copy of it? A. Yes.

Q. I will ask you to look. You said you believed so. A. It is.

Q. And the same resolution was in Plaintiff's Exhibit 5, set out, that is on behalf of the [337] other company, the Southwest Co-Operative.

A. That is right.

Mr. Laney: May it please the Court, at this time I feel I should offer in evidence the Articles of In-

(Testimony of Pauline McInerney.)

corporation of these companies. It has some bearing on the issues.

(Discussion off the record.)

Mr. Laney: Then at this time I offer in evidence a certified copy—certified, that is, by the local county recorder, photostatic copy of the original Articles of Incorporation of Southwest Co-Operative Wholesale and next, may it please the Court, I offer in evidence a like certified copy of the amendment to the Articles of Incorporation of the Southwest Co-Operative Wholesale.

Mr. Trask: When was that amendment made, Mr. Laney?

Mr. Laney: I think it was made after the start but—

The Witness: It was passed April 24, 1952.

Mr. Trask: Object to it. It was made after the contract.

Mr. Laney: Very well. In that connection would the Court hear me just a moment? [338] I feel that since it covers some of the future that is asked to be brought into this, that that would be relevant as showing what could be or is net income and what is not. It has some bearing on that and it does cover from thence forward. I ask that the amendment to the Articles that I have, the certified copies, be marked for identification.

(Defendant's Exhibit H marked for identification.)

Testimony of Pauline McInerney.)

(Defendant's Exhibit I marked for identification.)

Mr. Laney: I think if the Court should later see the relevancy of this I should make formal offer now. I do offer in evidence now Defendant's Exhibit H for identification, being the amendment to the Articles of Incorporation of Southwest Co-Operative Wholesale, which amendment was filed with the Corporation Commission on the 24th day of March of 1953.

The Court: How could it have been filed in March when it wasn't adopted until April?

Q. Did you say it was adopted in April?

A. Yes, it was adopted April 24, 1952, and then was filed with the State in March, 1953.

The Court: The following year?

The Witness: Yes. [339]

Mr. Laney: I beg your pardon. I think I was reading the certificate of the Commission.

The Court: All right.

Mr. Laney: I do make offer.

Mr. Trask: To which the plaintiff objects.

Q. Mrs. McInerney, during the time—how long have you been with these companies?

A. Since January, 1939.

Q. And then what have you been doing, what have been your duties with the company?

A. At the present time I do all the buying of the items for the Farmer Service Division which in-

(Testimony of Pauline McInerney.)

cludes the insecticide raw materials, the fertilizer materials, the feed.

Q. A little louder, please.

A. The feed concentrate proteins and grains, the items for the seed department, the items necessary for the maintenance of the machinery and the operation of the business and also assist in carrying out the policies of the Board in supervising the various departments which, according to my office of assistant secretary——

Q. I believe it has come out in evidence heretofore that you keep the minutes of the [340] meetings? A. Yes.

Q. Of the Board of Directors, and how long have you been doing that?

A. Since I started in 1939.

Q. Can you tell us from the minutes of the Board of Directors of Southwest Co-Operative Wholesale who the members of the Board of Directors of that organization were on March 6 of 1942, when the resolution was made about employment of Mr. Held?

A. I have them listed there on that piece of paper.

Q. Some of these documents here? A. Yes.

Q. Now that paper you are consulting, is that a tabulation that you yourself have made up from the official record? A. That is right.

Q. Now, who were the members of the Board of Directors of Southwest Co-Operative Wholesale then at that time? This is in March of 1952?

A. W. L. Smith and W. S. Dorman. I. F. Col-

Testimony of Pauline McInerney.)

er, Jack Click, Emil Rovey, Orville Knox, Dana Fisher and D. O. Essley. There were two vacancies in the Board at that time due to the resignation of Mr. Martin on the 28th day of February and due to the death [341] in February, of Mr. W. F. Moore.

Q. Taking those in order, is this the tabulation you were testifying from?

A. Yes, except I have the date here of January and I have eliminated the ones who were not there.

Q. How long was each member of the Board elected under the Bylaws and the actual election?

Mr. Trask: Object. The Bylaws speak for themselves.

The Court: It is three years.

Mr. Laney: I think the bylaws——

The Court: It has been testified to.

Q. Now then, when was the first one of those that you mentioned? Give his name and state when he was elected, what his term was.

A. Mr. W. L. Smith is the one who was first elected and Mr. Smith would have been re-elected or would have run for office in 1952. However, due to his death——

Q. Well when was he elected then?

A. He was elected in 1949.

Q. And his term would have been up in 1952?

A. 1952.

Q. On what date in 1952 would it have [342] been up?

A. The date of the annual meeting.

Q. When was that, normally?

(Testimony of Pauline McInerney.)

A. The meeting was normally in October.

Q. Well, when did his term begin? What month?

A. It would have begun at the annual meeting in 1949.

Q. The term that he was serving in, when did it commence? Did it run from what date?

A. The date of the annual meeting, whenever that would be.

Q. Well, when was the annual?

A. October, always.

Q. Then from October—Mr. Smith's term was from October of 1949, to October of 1952, was it?

A. That is right.

Q. Now, what other director or directors if any were in that same category—that is, that their terms were from October of 1949, to October of 1952?

A. Mr. C. M. Martin and Mr. W. S. Dorman.

Q. Were there some directors whose terms then ran from October of 1950, until October of 1953?

A. Mr. Collier, Mr. Moore, who is since deceased, and Mr. D. O. Essley were elected in 1950, in [343] October.

Q. And their terms would expire then in October? A. Yes.

Q. Was there a set of certain directors whose terms ran from a later date?

The Court: '51 would be the next.

Mr. Laney: Yes, thank you.

A. October, 1951, was Mr. Dan Fisher, Mr. Jack Click, Mr. Emil Rovey and Mr. Orville Knox.

Q. And they would expire then in——

(Testimony of Pauline McInerney.)

A. In 1954.

Q. Now, the three-year terms of the purported contract with Mr. Held then was from April 1 of 1952? April 1, 1952, to April 1, 1955, was it?

A. It was for a 3-year term, yes.

Q. Now, as to the Board—you were talking of the board of United Producers and Consumers?

A. No, Southwest Co-Operative.

Q. Southwest Co-Operative Wholesale. Now as to the Board of Directors of United Producers and Consumers, how many members of the Board were there, according to the Bylaws of that?

A. There are 7.

Q. And here in March and April of 1952, I will ask you to give the names of the directors and [344] their several terms showing when they began and when they would expire as to that company.

A. The first group were elected in October of 1950. That was Mr. D. O. Essley, Mr. W. S. Dorman.

Q. Did they hold for three year terms likewise?

A. Yes, sir, 1951, October, Mr. Jack Click and Mr. Ralph Ashby were elected, served three year terms, 1952. Mr. I. F. Collier, Mr. John Biggs and Mr. Holly Smith were elected to serve three year terms.

Q. When you say they were elected did their terms begin in those months? A. Yes, sir.

Q. At the time when Mr. Held was purportedly manager there from April 1, June 20 of 1952, what

(Testimony of Pauline McInerney.)

records and reports of the corporations were kept in your office and under your supervision?

A. The summaries of most of the information was in my office which would be available to the Board or anyone who wanted to see them and I had the weekly analysis of the farm service division with daily sales of all departments, the weekly inventories at the feed mill, the daily inventories at the insecticide department, the daily sales at the insecticide department and the truck reports showing the daily deliveries and operation of the vehicles for each day for the [345] feed mill, insecticide and fertilizer departments, the lumber yard, the furniture and petroleum departments.

Q. And I will ask you whether those records were during all of this time kept in your office?

A. That is right.

Q. Now, I will ask you whether you were there all of the time during the time that Mr. Held was ostensibly manager?

A. Yes, sir, I was.

Q. And during that time did he ever ask for any of those reports or consult any of them?

A. No, he did not.

Q. Are those records of the condition of the various departments—did he ask to consult any of those?

A. No, sir.

Q. Did you have records then of the inventories and prices of raw material for insecticide, fertilizer and seed?

A. Yes, sir.

Q. Did he ever discuss with you or ask you for any of those inventories for this period?

Testimony of Pauline McInerney.)

A. No.

Q. About what volume was the sales—[346]
about what volume of raw materials was purchased
per year at that time?

A. The departments which I bought for which
includes all the departments in the farm service
division will be approximately \$2,000,000.

Q. And approximately what percentage of the
business of the company did the farm service cover?

A. Approximately 65%.

Q. Were there any major suppliers of material
to the company that attempted to see Mr. Held while
he was supposed to be manager?

A. I recall only one. The west coast representa-
tive for the Gidy Corporation came in one afternoon
and waited approximately two hours, before I knew
he was there, for Mr. Held said that he had written
to his——

Mr. Trask: I object.

Q. Was he able to see Mr. Held?

A. He was not.

Q. Was Mr. Held there? A. He was not.

Q. Had he told you or left any word where he
was? A. No, sir.

Q. Did this man come back and try to see [347]
him?

A. Yes, he came back the next day and I had
informed Mr. Held he wanted to see him and when
the gentleman came in Mr. Held was not there.

Q. You had informed Mr. Held that he wanted
to see him? A. Yes.

(Testimony of Pauline McInerney.)

Q. But Mr. Held didn't show up the next day?

A. He was not there when the gentleman came.

Q. Was he able to see him at all?

A. No, sir.

Q. And this man was, you say, a major supplier of what?

A. Gidy Corporation is a producer of DD² mainly. Used in insecticides.

The Court: Wanted to sell something?

Q. About what percentage of the business is in the insecticide department?

A. Approximately 25%.

Q. You heard some testimony about this barley deal where there was some mixup about wild oats. Was that settled while Mr. Held was there?

A. No, it wasn't.

Q. When was it settled, if you know?

A. Oh, I would imagine sometime in the [348] middle of July.

Q. And what was done in that regard? Who did it?

A. It was settled in that we had the county agent's office and go to see Mr. Tromley and explain——

Mr. Trask: I don't see any material bearing on this, in July what the details are.

Q. Then it wasn't settled by Mr. Held?

A. No, sir.

Q. During the time that Mr. Held was there did he do anything that you could observe there in the normal way of discussing with department heads

(Testimony of Pauline McInerney.)

and with regard to the management and the conduct of it, just what did you observe in that regard?

A. He did very little because he was there very little of the time. He did hold two staff meetings, one about the middle of May and one about two weeks later and other than consulting with Mr. Huber, a few times, that was about the extent of what I could see that he did with the operation of the business.

Q. In the running of the business I will ask you to state whether you have observed whether it is necessary for the manager to be there to co-ordinate affairs and to discuss things with the heads of departments? [349]

Mr. Trask: Object. Calling for a conclusion. Incompetent, immaterial.

The Court: Yes.

Mr. Laney: You may take the witness.

Cross-Examination

By Mr. Trask:

Q. Mrs. McInerney, you have the bylaws of the United Producers and Consumers there in your possession? The minute book, excuse me, I misspoke myself; you have the minute book of the United there? A. Yes.

Q. You say you kept the minutes of both corporations? A. That is right.

Q. Do you know that the bylaws of the United have been amended from time to time by the Board at its regular meetings, do you not?

(Testimony of Pauline McInerney.)

A. Yes, sir.

Q. With respect to the Board of Directors of the Southwest Consumers, most of the members of the Board have been there and been on the Board serving successive terms by re-election since the company was incorporated, have they not?

A. I believe we have six directors at the present time who are different since the time of [350] incorporation—just a moment and I will count them. On the Board of 10, in 1944, at the time of incorporation only 4 of those directors remain.

Q. Referring to Defendant's Exhibit G in evidence, which is the certified copy of the Articles of Incorporation of Southwest Co-Operative Wholesale, Article 1 of the Articles sets out the names of the incorporators, does it not? A. Yes, sir.

Q. The first one is W. L. Smith?

A. Yes, sir.

Q. He served until the time of his death, successive re-elections, did he not? A. Yes, sir.

Q. The next is Mr. W. F. Moore. He served by successive re-elections until his death?

A. Yes, sir.

Q. Mr. W. S. Dorman is the next and he is still on the Board? A. He is deceased.

Q. When did Mr. Dorman pass away?

A. In April of this year.

Q. Then he served until his decease by successive re-elections? A. Yes. [351]

Q. Mr. I. F. Collier is one of the incorporators,

(Testimony of Pauline McInerney.)

Q. Is he still on the Board? A. Yes, sir.

Q. Mr. John Butler is no longer on the Board?

A. No, sir.

Q. The next one is Mr. D. O. Essley, he is still on the Board? A. Yes, sir.

Q. Harry F. Michael, he is no longer on the Board? A. No, sir.

Q. Did he die? A. Yes, sir.

Q. Did he serve until his death?

A. Yes, sir.

Q. Mr. Orville Knox is still on the Board?

A. Yes, sir.

Q. Mr. C. M. Martin, he is the only one who has resigned?

A. That is right. Mr. Butler and Mr. Martin are no longer on the Board.

Q. They served until they resigned by successive re-election? A. That is right. [352]

Q. Now, the same situation substantially controls with respect to the United Producers and Consumers, does it not?

A. There were 5 incorporating directors. We have since added to—we have a board of 7 at present.

Q. Let me show you Defendant's I in evidence, the Articles of Incorporation of the United Producers and Consumers. The names of the incorporators are Mr. W. S. Dorman, Click, Essley, Smith, Collier. All of those are still directors except two who have died, is that not true? A. Right.

(Testimony of Pauline McInerney.)

Q. They all were incorporators and served by successive re-elections up to the present time?

A. Yes.

Q. Except for the ones deceased, they are still serving? A. Yes, sir.

Q. Actually, so far as you know, they will be re-elected for successive terms hereafter?

A. There is no way of knowing.

Mr. Laney: Speculative.

The Court: Oh, yes.

Q. With respect to this supplier, Mr. Gidy, [353] who sold DDT, you had a contract at the time with the company for the DDT, did you not?

A. Yes, sir.

Q. He was just there trying to sell a product?

A. He was there at the request of his employer to whom Mr. Held had written advising that he was here for Southwest Co-operative Wholesale.

Q. Did you tell Mr. Held what time he was coming in or make an appointment?

A. No, sir, I did not know. I told him he would be in in the morning.

Q. You say you wrote these letters notifying Mr. Held of the action of the Board of Directors of the two companies dismissing him?

A. Yes, sir.

Mr. Laney: You mean she typed them?

Q. Yes, you typed them. Calling your attention to Plaintiff's Exhibit 4, this recites that at a meeting of the Board of Directors the United Producers passed a resolution that began, "Mr. Emil Rovey

stimony of Pauline McInerney.)

le motion"—so forth and so forth—Mr. Emil
rey wasn't even on the Board, was he?

. No, he is not. I imagine the names were inter-
nged. We will check with the minutes of [354]
meeting.

. Take a look at it. Was Mr. Emil Rovey on
Board of United Producers? A. No, sir.

. Actually he couldn't have made any motion
dismissal for United, could he?

. No, sir, however the minutes would indicate.

. As far as your notice of dismissal then, it is
error, is it not? A. As to name, perhaps.

. Mrs. McInerney, you say Mr. Held did con-
staff meetings on at least two occasions in
y? A. Yes.

. That is at which time the heads of the depart-
ts were invited in for staff meetings, consulta-
s? A. Some of the heads were, yes, sir.

. And you said that he did consult Mr. Huber
n time to time?

. Yes, I would have no knowledge of the exact
e.

. Mr. Huber is the man who is in charge of the
ous departments down there, is he not?

. Yes, sir, from the retail angle. [355]

. He is still there? A. Yes.

r. Trask: I believe that is all.

(Testimony of Pauline McInerney.)

Redirect Examination

By Mr. Laney:

Q. As to this error about Emil Rovey, will you turn to the minutes of the United Company there of June 20? I will ask you to read the full motion as shown by the minutes of the United Producers and Consumers from your minute book relative to that matter. A. (Motion read.)

Q. Then the letter of notification—did it simply copy the resolution in the other minutes?

A. Yes, it was just interchange of names in the two companies.

Q. And so then have you the minutes of the Southwest Co-operative Wholesale of the same date?

A. Yes, sir.

Q. I will ask you whether the letter that is in evidence as Plaintiff's No. 4—I will ask you whether the two meetings were held together, the meetings of both companies together? [356]

A. The Southwest was held first and the United immediately following.

Q. What was the resolution, just the resolution part of the other company, the United?

A. "Mr. Rovey made motion that in view of the fact that the members of the Board of Directors are of the opinion that Mr. Ralph W. Held was never legally employed and the illegality of his employment has only recently been discovered by the Directors in view of the fact that he has never fulfilled

testimony of Pauline McInerney.)

terms of the contract that his purported employment be declared at an end."

Mr. Laney: That is all.

Recross-Examination

Mr. Trask:

Q. I neglected to ask you a question about the contract that Mr. Smith and Mr. Held prepared. Respective of what the source of it might have been you were present when Mr. Smith and Mr. Held together dictated and agreed upon the terms of the contract which you wrote and Mr. Smith signed, were you not?

A. Mr. Held dictated certain terms which were incorporated in the contract and Mr. Smith signed it.

Q. They both agreed they were both [357] present at the time the provisions were being dictated and agreed to them, did they not? A. Yes, sir.

Q. I presume you keep accurate record of the minutes and who is present at the various meetings, you not? A. Yes, sir.

Q. Would you refer to your minutes of April and state to the Court whether or not Mr. Lewis Ahmsley was present at the meeting of April 3?

A. Yes, sir.

Q. It shows that he was? A. Yes.

Q. That is the meeting at which the minutes of the meeting of March 6 were read and approved?

A. Yes, sir.

(Testimony of Pauline McInerney.)

Q. And the minutes of March 6 which were read and approved contain the resolution of the corporation authorizing Mr. Wahmsley and Mr. Smith to work out the terms of employment?

A. Yes, sir.

Q. The minutes of United likewise show Mr. Wahmsley was present at the meeting of April 3?

A. Yes, sir.

Q. With respect to this telegram at this [358] meeting did I understand you to say that Mr. Laney drew that telegram? A. Yes, sir.

Q. He was present at the meeting of May 27 and prepared the telegram?

A. No, sir, he was not.

Q. You employed Mr. Laney then to prepare the telegram that was sent?

A. Mr. Essley on Monday when he came into the office and asked about Mr. Held and at that time looked at the contract, took the contract to Mr. Laney and asked his advice.

Q. And was this meeting held in Mr. Laney's office, this meeting of the 27th?

A. No, sir, it was not.

Mr. Trask: I believe that is all.

Redirect Examination

By Mr. Laney:

Q. Do you have any remembrance whether Mr. Wahmsley was present at the first part of this meeting of April 3?

Mr. Trask: Object to the question as calling—

testimony of Pauline McInerney.)

attempt to impeach the minutes, statement of his
n witness.

A. I wouldn't be able to say he was present
[359] all the meetings.

Q. You don't remember whether he was there?

Mr. Laney: That is all.

Mr. Trask: No further questions.

Mr. Laney: The defense rests, your Honor.

(The regular noon recess was taken.) [360]

The Court: You may proceed.

JAMES LEONARD

led as a witness by and on behalf of the Plaintiff
rebuttal, being first duly sworn, testified as fol-
ws:

Direct Examination

Mr. Trask:

Q. Will you state your name, please?

A. James Leonard.

Q. Where do you live?

A. 4225 North 42nd Street in Phoenix.

Q. What is your occupation or profession?

A. Certified public accountant.

Q. Mr. Leonard, were you ever employed by the
defendant corporations or either of them—that is
United Producers Consumers or Southwest Co-
operative Wholesale?

A. Yes, sir, I was the office manager for them.

Q. During what period of time was that?

A. May, 1950, to April 30, 1952.

(Testimony of James Leonard.)

Q. '52 or '53? A. '53.

Q. You have now your own accounting business?

A. Yes. [361]

Q. During that time did you have occasion to know Mr. Held, Mr. Ralph Held, the plaintiff in this action? A. Yes, sir.

Q. As office manager what were your duties there, Mr. Leonard?

A. Well, generally was to supervise accounting and pricing departments and to see that the work was performed and reports forwarded to the proper people.

Q. As office manager, was it your office that had charge of the statistical information, that is the monthly sales and the monthly income and the expense and all of those items? A. Yes, sir.

Q. And did you prepare from time to time reports for the use of the officers and directors as to the progress of the company in a statistical way? That is, their sales and volume and expense and profit and so forth? A. Yes, sir.

Q. Do you know whether or not during that time—did you ever furnish that information to Mr. Held? A. Yes, sir, I have.

Q. Did he as far as you could observe seem [362] to take an interest in the financial progress of the company and its affairs as far as the statistics and bookkeeping and auditing and accounting is concerned? A. Yes, sir.

Mr. Laney: Object to his leading the witness.

The Court: I think he might answer that.

Testimony of James Leonard.)

Q. Mr. Leonard, in that connection let me show you Plaintiff's Exhibit 13 for identification. Do you recognize what that is?

A. Yes, sir, it is an analysis of the sales for the month of April, 1951, comparison between '51 and '52 for the month of April.

Q. Who prepared that? A. I did.

Q. Is that in your handwriting?

A. Yes, sir.

Q. At whose request did you prepare it?

A. At Mr. Held's request.

Q. What was it prepared to show?

A. It was prepared to show the reason the net margin was not so great although the sales volume had increased.

Q. During what month? [363]

A. During the month of April, 1952.

Q. It was an analysis that you prepared of sales volume during April at Mr. Held's request?

A. That is right.

Q. Did you deliver it to him for that purpose?

A. Yes, sir, I did.

Mr. Trask: I offer it in evidence. It is offered, the Court please, for the purpose of showing by way of rebuttal that Mr. Held did take an interest in the reports.

Mr. Laney: No objection.

(Plaintiff's Exhibit 12 received in evidence.)

Q. Showing you 12 in evidence which is the report you just testified about, Mr. Leonard, during

(Testimony of James Leonard.)

the course of your preparation of this, did you have any conversations with either Miss McInerney or Mr. Wahmsley? Did either of them come around and see you preparing this? A. Yes, they did.

Q. Did Mrs. McInerney come around and see you preparing this? A. Yes, sir.

Q. Did she have any comment to make to [364] you or ask you why you were preparing it?

A. Yes, she asked me.

Q. Did you tell her that you were preparing it at the request of Mr. Held?

Mr. Laney: Object to leading the witness.

A. I did say that.

Q. And what was her comment to you at that time?

A. The comment at that time was that——

Mr. Laney: Object to that as calling for hearsay, not trying to impeach anything, wasting time.

Mr. Trask: The purpose of it is to show that an officer of the corporation made the suggestion that this information need not be gotten to Mr. Held. That is the purpose.

The Court: Well, all right, go ahead.

Q. What was the comment that was made at that time? What did she say?

A. She said it wasn't necessary to make that report.

Q. For Mr. Held? A. That is right.

Q. Nevertheless, Mr. Held asked that it be [365] prepared and you prepared it?

A. That is right.

(Testimony of James Leonard.)

Q. Do you know whether or not during the time you were there did you observe Mr. Held holding staff meetings?

A. Yes, sir, he held two that I know of and both of them I attended.

Q. How about regarding payroll records and paying raises and approval of raises—did Mr. Held have anything to do with that to your knowledge?

A. Yes, sir; he signed all cards authorizing increases in salary for the employees of the firm.

Q. Those cards were delivered to him by whom?

A. By Ernest Huber.

Q. Do you keep down there such a thing as a ten-day daily sales report?

A. Yes, sir.

Q. What are those?

A. They are reports of the volume of business done for each ten days during the month and it is followed by department up and down by department and whether or not it is also a member sale or non-member sale or through an agency. [366]

Q. Who prepares those?

A. The bookkeeper. United Producers bookkeeper prepares the report and gives it to me.

Q. That is under your supervision and direction?

A. Yes, sir.

Q. Do you know whether any of those were delivered to Mr. Held?

A. Yes, sir, I took the first one after he was brought into Mr. Held and showed it to him.

Q. Do you know anything about the weekly feed

(Testimony of James Leonard.)

price list and revising the mailing list? How is that handled?

A. Well, before Mr. Held came we had a mailing list on feed prices, approximately 200 names of people and due to the reduction in the volume of sales and trying to work to increase it, Mr. Held was interested in enlarging the mailing list and also contacting more people, getting it out to the general members.

Q. Did he work with you in that regard?

A. Yes.

Q. Did you see him work with any other people in the organization in doing that?

A. Well, no, sir. I didn't see him working [367] directly with any other people although I know he did because they asked me concerning costs of certain operations.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. Now, calling your attention to Plaintiff's Exhibit 13, what is it you call that?

A. It is a comparative statement of operations April, 1951, with April, 1952.

Q. When was that prepared?

A. Approximately shortly after the middle of May and probably around the 19th or the 20th.

Q. 19th or the 20th of May?

A. That is right.

(Testimony of James Leonard.)

Q. But there is no such statement of that sort prepared for Mr. Held before that?

A. There is a monthly statement of operations showing the volume of sales and so forth. It is a monthly report showing margin and also the whole organization financial picture and operations for the month go in to him each month and on the basis of that report is the reason for this.

Q. Now, when did he ask for those reports?

A. For which ones? [368]

Q. The ones you are talking about.

A. The monthly reports were due on the 20th of each month.

Q. Isn't it a fact that he started asking for these shortly after June 9 chiefly?

A. No, sir.

Q. Now, do you say that this document, Plaintiff's Exhibit 13, was a document that you showed Mrs. McInerney and she said not to give it to Held?

A. I didn't show it to her; she came to my desk for other purposes and saw that I was working on it and asked me why and I told her.

Q. When was that?

A. In the morning I was preparing it.

Q. When? What month?

A. That was in May.

Q. About what time in May?

A. About the 20th of May.

Q. You are sure it wasn't about the 27th of May?

A. Well, it was before the monthly board meet-

(Testimony of James Leonard.)

ing in May and it was shortly after the preparation of the monthly report so it would have to have been right about the 20th of May. [369]

Q. Now, when did you give this to Mr. Held, if at all?

A. I gave it to him the same day I prepared it.

Q. And when did you finish preparing it?

A. The same day he asked for it. He asked for it in the morning.

Q. I mean what date of the month?

A. Well, if the monthly report was given to him on the 20th in the evening then I prepared it on the 21st. If it was another day—actually I don't recall just what day the 20th is. If it was more—if it was Monday, Tuesday or Wednesday—it might be a Sunday but it was——

Q. You recall you stated to Mrs. McInerney, did you not, that Wahmsley, the auditor, was not to see the report before the board meeting. You remember that, don't you?

A. No, sir, I did not. I did not say anything like that to Mr. Wahmsley. He did see the report.

Q. No. Didn't you say to Mrs. McInerney that Mr. Wahmsley was not to see this report before the board meeting?

A. No, sir; he saw that report before the board meeting. He saw it while I was preparing it. [370]

Mr. Laney: No questions.

Mr. Trask: No further questions.

JOHN W. BLAKE

called by the Plaintiff as a witness in rebuttal, being
first duly sworn, testified as follows:

Direct Examination

Mr. Trask:

Q. Where do you live?

A. 8118 North 38th Drive.

Q. What is your present occupation?

A. Office and credit manager.

Q. For what concern?

A. Firestone Tire and Rubber Company.

Q. You are appearing here under subpoena?

A. Right.

Q. Mr. Blake, were you ever employed by either
the United Producers and Consumers or the South-
west Co-operative Wholesale? A. Yes, sir.

Q. Were you employed by those corporations
during the time or a portion of the time that Mr.
Ralph Held was the manager? A. I was.

Q. What were you doing? What was your work
at that time? [371]

A. I was handling the advertising and mer-
chandising for the company.

Q. As such who did you work with principally?
Who was your immediate superior, the man you
worked with? A. Ernest Huber.

Q. And Mr. Huber was the man in charge of
the various stores and retail outlet divisions of the
United, is that correct? A. That is right.

Q. In connection with your work as advertising

(Testimony of John W. Blake.)

manager or in charge of sales did you have any occasion to work with Mr. Ralph Held during the time he was manager? A. I did.

Q. What did you do?

A. Well, we set up a different advertising program than what we were under previously to his employment there. We signed a contract with Arizona Farmer for space for their advertising once every two weeks.

Q. And did you do some advertising in any other mediums?

A. In the Arizona Republic and Gazette we made a couple advertisements in there. [372]

Q. In working out your advertising program with the farmer—Arizona Farmer, who worked with you on that? A. Mr. Held.

Q. Did you make trips away from the office with Mr. Held and work that program out?

A. We made three trips, I believe, to Arizona Farmer.

Q. And with respect to your advertising in the Republic and Gazette prior to the time Mr. Held came there, had there been any advertising in the Republic and Gazette?

A. Not during my employment.

Q. What was your particular purpose in wanting to advertise in the Republic and Gazette at this time?

A. Well, we had an overstock of tires in a couple of sizes and we thought that if we could reduce the price and still make a substantial markup and get

Testimony of John W. Blake.)

them in an advertising medium that would reach the people, that we could move some of the tires.

Q. Had you been successful in getting an advertising program prior to Mr. Held's coming there that would sell the tires? A. No, sir.

Q. After he came there did you consult [373] with him about your ideas about advertising program? A. I did.

Q. The—as a result of that consultation what did he authorize you to do?

A. He authorized me to, I believe we run one or two ads in the Republic and Gazette, authorized both of those and he authorized the signing of the contract with the Arizona Farmer for one year's time.

Q. What was the result of your advertising program in the Republic and Gazette?

A. Well, we sold an awful lot of tires.

Q. Would you say it was successful or unsuccessful? A. I would say it was successful.

Q. Did you see Mr. Held around there from time to time during the time he was employed there?

A. Yes, sir.

Q. As far as you know did he appear to take an interest in the affairs of the corporation as far as you could observe?

A. He did in my case I know and I know of a few times where he was out with field men.

Q. The field men would be men like Mr. Tway and Mr. Holmes and Klein and those people? [374]

A. Yes, sir.

Q. You have seen them out on those trips?

(Testimony of John W. Blake.)

A. No, I have never seen them out. I heard from his secretary, I believe that he was out.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. When did you first go to work there?

A. I went to work there April 10, 1950.

Q. And in whose department were these tires?
Who was the head of that department?

A. I suppose Ernest Huber was.

Q. What department was it, the hardware?

A. It was the hardware department.

Q. Wasn't Bill Eden head of that?

A. I never took any orders from Bill Eden. I took mine from Ernest Huber directly.

Q. You are talking about the success of some ads in the Republic and the Farmer. You still had an overstock of tires after that was over, didn't you?

A. Yes, sir, but we had a terrible overstock when he started.

Mr. Laney: That is all.

Mr. Trask: No further questions. [375]

RALPH W. HELD

Plaintiff, having been previously sworn, resumed the stand and testified in rebuttal as follows:

Direct Examination

By Mr. Trask:

Q. Mr. Held, in connection with the testimony in defendant's case it has been brought out to some extent that you didn't have available reports. Did you take the time to check the reports and documents reflecting the business of the corporation from time to time during the time you were there?

A. Yes, sir.

Q. How were those reports made up?

A. We had several kinds. We had the monthly reports that we used in board meetings and we had ten-day sales reports that I was guided by mainly.

Q. And were there balance sheets and other statistical documents prepared by the bookkeeping and auditing department?

A. Yes, sir.

Q. Did you ever have any of those furnished to you or check them or investigate them at any time?

A. The ones that I mentioned were furnished me regularly.

Q. I will show you Plaintiff's Exhibit 14 [376] and ask you to state what those various reports are?

A. Those are the monthly reports, the balance sheet and the opening statement and sales analysis and also an operating cost analysis for the months of April, 1950—April, 1951; April, 1952; May 10, 1951, and May, 1952.

(Testimony of Ralph W. Held.)

Q. And did you ask that these be given to you and did you consult and study them during the time you were manager?

A. Yes, sir; those were a report that had been in use before I came there. I didn't change it particularly but I reviewed them prior to each of the board meetings when they were presented.

Mr. Trask: I offer it in evidence.

Mr. Laney: No objection.

Mr. Trask: Offered for the purpose of establishing the witness' interest in the corporation.

(Plaintiff's Exhibit No. 14 received in evidence.)

Q. Mr. Held, in addition there is one little item I would like to bring out. Did you learn of some problem during the time you were there the early part of your management of the corporation concerning your oil sales or the oil of the corporation, petroleum products? A. Yes, I did. [377]

Q. How did you come to learn of that problem?

A. Well, at the time of my first call on Mr. Jack Click, a member of the board, sometime in April, I don't recall the exact date, we got to visiting about our petroleum operation and he mentioned to me that he didn't use the lubricating oils that the co-operative had for sale because he was a little fearful of what it might do to his equipment and with a statement like that from one of the directors I thought possibly I ought to check it so I took free

(Testimony of Ralph W. Held.)

samples and sent them to an independent chemical laboratory in Chicago for analysis.

Q. Did you receive an analysis from that laboratory?
A. Yes, sir.

Q. I show you Plaintiff's Exhibit 15 and ask you to state whether or not that is the analysis you received.
A. That is it.

Q. Did you do anything about this—make the information available to any member of the corporation?

A. I brought it up in, I believe, the May board meeting.

Mr. Trask: Offer it in evidence.

Mr. Laney: No objection. [378]

(Plaintiff's Exhibit No. 15 received in evidence.)

Q. Mr. Held, there has been some testimony regarding the size of the co-op organizations here. How do they compare in size with the organizations that you were managing in Iowa?

A. Well, the last year that I worked for the Iowa Farm Service Company their annual sales exceeded \$8,000,000.

Q. As compared to what volume of sales annually of the defendant corporation?

A. Oh, just very roughly, that would be twice the amount of the defendant corporation.

Q. And with respect to the corporation that you were managing in Iowa during the time you were here, the number of employees, what comparison do

(Testimony of Ralph W. Held.)

you have, how did they compare with the defendant corporation?

A. That depends on whether you take in the member companies of the wholesale that I was working for or whether you refer merely to the wholesale but since we are referring to both of them here I presume that I should refer to both of them back there.

Q. Well, on that basis how do they compare?

A. Well, we had about 250 salesmen and [379] 30 local company managers and, of course, the regular office staff under each company manager.

Q. As compared to here, they only have the two corporations and a few, one or two retail outlets?

A. That is right.

Q. Did the volume of business during your ten years as manager there increase or decrease?

A. The sales volume in dollars as near as I can remember it the first year or the year prior to the time I went there was approximately \$2,000,000 and it was about \$8,000,000 the year that I left.

Q. Was your leaving those concerns for what reason?

A. Well, I resigned effective March 15, 1952.

Mr. Laney: I don't see the relevancy of this.

Mr. Trask: The only purpose is there has been some question of the plaintiff questioning his qualifications. It is for that purpose.

Q. Now, Mr. Held, with respect to the contract that is in question here, did anyone ever, of the defendant corporation, board, officers or any mem-

Testimony of Ralph W. Held.)

bers, ever state to you or suggest to you in any way that President Smith did not have complete authority to [380] execute the contract on behalf of the corporation? A. No, sir, they did not.

Q. Did anyone call to your attention or suggest that Wahmsley's approval or signature was necessary to the validity of this contract?

A. No, sir.

Q. Did Mr. Wahmsley ever say or do anything to suggest that the contract did not meet with his approval? A. No, he didn't in my presence.

Q. So far as you know did he appear—did he discuss the provisions of the contract with you during his negotiations and appear to approve them?

Mr. Laney: Object to calling for a conclusion.

Mr. Trask: I believe that is all.

Cross-Examination

By Mr. Laney:

Q. And you did not make any effort to find out what the terms of the resolution were that authorized Smith and Wahmsley to work out the terms of the contract with you, did you?

A. Not particularly, no.

Q. And you merely took Mr. Smith's word [381] for it that he had authority to make the contract, did you?

A. Well, he was president of the two corporations and I had met with him in a board meeting of both corporations and I think it is natural to assume

(Testimony of Ralph W. Held.)

that when he told me that he had that authority that he was correct.

Q. You remember now that he did take this resolution to Mrs. McInerney in your presence and hand it to her saying that it was the resolution about employing you and that she then said something about your employment. You remember that, don't you?

A. I was in Mrs. McInerney's office when Mr. Smith came in after the board meeting and he handed her something but nobody read it to me and I didn't read it and I wouldn't have had any way of knowing what it was.

Q. You do remember that Mrs. McInerney said something about we will be glad to have you come here as manager? A. Yes.

Q. Upon your memory being refreshed, wasn't it said that that was the resolution about the management?

A. I don't recall that anything was said about any resolution and nobody read any resolution to me. [382]

Mr. Laney: That is all.

Mr. Trask: No further questions. Plaintiff rests on rebuttal. At this time the Plaintiff moves for judgment on the pleadings and the evidence.

Mr. Laney: And, of course, we resist the motion.

(Date fixed for argument to the Court.)

(Whereupon, at 2:30 p.m. court was adjourned.)

I hereby certify this is a true and complete transcript of my shorthand notes.

/s/ GLORIA FRANDLE,
Official Reporter.

[Endorsed]: Filed March 29, 1954. [383]

Title of District Court and Cause.]

CLERK'S CERTIFICATE OF
RECORD ON APPEAL

United States of America,
District of Arizona—ss.

I, William H. Loveless, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of Ralph W. Held, Plaintiff, vs. United Producers and Consumers Co-operative, a corporation, and Southwest Co-operative Wholesale, a corporation, Defendants, numbered Civ-1798 Phoenix, on the docket of said Court.

I further certify that the attached and foregoing original documents bearing the endorsements of filing thereon are the original documents filed in said case, and that the said original documents constitute the record on appeal in said case as designated in the Designations filed therein and made a

part of the record attached hereto and the same are as follows, to wit:

1. Plaintiff's Complaint, filed October 10, 1952.
2. Defendants' Answer, filed November 4, 1952.
3. Order for Judgment for the plaintiff, dated August 25, 1953, and filed August 26, 1953.
4. Plaintiff's Proposed Findings of Fact, Conclusions of Law, and Judgment, filed September 4, 1953.
5. Defendants' Proposed Amendments and Additions to Plaintiff's Proposed Findings, filed September 9, 1953.
6. Findings of Fact, Conclusions of Law, and Judgment, filed October 6, 1953.
7. Defendants' Motion for New Trial, Motion to Amend Findings, and Motion to Amend Judgment, filed October 14, 1953.
8. Order Modifying Judgment, filed February 24, 1954.
9. Stipulation and Order of Substitution of Attorneys of Record for Defendants, filed March 23, 1954.
10. Order Denying Motion for New Trial, Amending Findings of Fact in Part and Amending Judgment in Part, filed March 23, 1954.
11. Notice of Appeal, filed March 24, 1954.
12. Defendants' Supersedeas Bond on Appeal, filed March 29, 1954.
13. Reporter's Transcript of Record, filed March 29, 1954.
14. Defendants' Exhibits A, B, C, D, and G in evidence.

15. Defendants' Exhibits E, F, H and I for identification.

16. Plaintiff's Exhibits 1, 2, 3, 4, 5, 8, 9, 11, 12, 13, 14, and 15 in evidence.

17. Designation of Contents of Record on Appeal.

18. Order Extending Time for Filing of Record on Appeal.

19. Stipulation and Order of Substitution of Scoville & Linton as attorneys for Defendants.

I further certify that the Clerk's fee for preparing and certifying this said record on appeal amounts to the sum of \$2.00 and that said sum has been paid to me by counsel for the appellant.

Witness my hand and seal of said Court this 17th day of June, 1954.

[Seal] /s/ WM. H. LOVELESS,
Clerk.

[Endorsed]: No. 14400. United States Court of Appeals for the Ninth Circuit. United Producers and Consumers Co-operative, a Corporation, and Southwest Co-operative Wholesale, a Corporation, Appellants, vs. Ralph W. Held, Appellee. Transcript of Record. Appeal From the United States District Court for the District of Arizona.

Filed June 21, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14400

UNITED PRODUCERS AND CONSUMERS
CO-OPERATIVE, a Corporation, and
SOUTHWEST CO-OPERATIVE WHOLE-
SALE, a Corporation,

Appellants,

vs.

RALPH W. HELD,

Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY

The Appellants in the above-entitled action, pursuant to Rule 17 (6) of the above-styled Court, hereby present the following statement of the points on which they intend to rely on this appeal. (The parties will be referred to by the same designations as they appear in the District Court, Appellants as Defendants and Appellee as Plaintiff.)

The granting of judgment in favor of Plaintiff versus the Defendants and the failure to grant Defendants' Motion for New Trial and the failure to grant Defendants' Motion to Amend the findings and the rendering of judgment thereof are not justified by the record and are contrary to law, upon the following grounds and for the following reasons, to wit:

1. When a Board of Directors of a corporation by resolution authorizes its president and auditor to employ a person as general manager and work out the terms of the employment, that does not authorize the President alone to employ the manager and fix the terms of his employment and an attempted employment and agreement as to terms of employment by the president alone is unauthorized and does not result in a valid contract.

2. When the Board of Directors of a corporation authorizes its president and auditor to employ a person as general manager and work out terms of employment, that authorization implies an employment not in conflict with the articles of incorporation and bylaws of the corporation, and any attempted employment in violation of the articles and bylaws is beyond the scope of the authority of the agents and does not result in a valid contract.

3. The Board of Directors' action does not constitute an amendment of the bylaws in view of the statutory procedure for amendment as set forth in § 9-701, et seq., Arizona Code Annotated, 1939, which procedure is exclusive, and, therefore, any attempt to amend the bylaws, without following the statute, is void as against public policy and, further, no meeting was ever called by the corporations' Boards for the purpose of amending the bylaws, as provided in the bylaws.

4. The articles and bylaws of the corporations provide that the manager holds his office at the

pleasure of the Boards of Directors. Therefore, if the Boards did authorize the agreement, they acted beyond their authority and their acts, therefore, are void.

5. The attempted employment on behalf of a corporation of a general manager for a term which would extend beyond the terms of office of all of the Directors of the corporations, is contrary to public policy and does not result in any valid or enforceable contract, since one Board of Directors cannot bind subsequent Boards as to personnel to carry on the operation and management of the corporation.

6. The attempted employment for a definite period of years of a general manager, with said manager having power to employ and discharge all persons needed to carry on the business of the corporations is illegal and of no binding effect on the corporations, where it is shown that the articles of incorporation and bylaws provide that the affairs of the corporations shall be conducted by the Board and that the Board shall have the power to appoint and remove all officers and the power to appoint a manager who shall hold office at the pleasure of the Boards of Directors.

7. The Boards of Directors of the corporations did not ratify the contract.

8. If an alleged contract to employ a manager was beyond the powers of the Boards of the corporations to make, then such alleged contract cannot thereafter be ratified by the Directors of the cor-

orations so as to make the corporations liable hereunder, inasmuch as the Boards of Directors can ratify for their corporations only that which they could legally have done in the first instance.

9. The fact that one is dealing with a person whom he knows to be an agent is a danger signal and the person so dealing with an agent if he would find the principal must ascertain the extent of the agent's authority and if the agent lacks authority to make a purported contract and the person dealing with him knows or in the exercise of caution could ascertain that the agent lacked such authority, then the purported contract is not binding upon the principal.

10. There was a complete failure of performance under the contract by the Plaintiff, even assuming that the contract was valid and enforceable.

11. There was no ratification of the contract by the Boards for laches for the reason that upon discovering the terms of the contract, the Boards promptly notified the Plaintiff that their authority to enter into the contract and the contract was questioned and that in any case the contract was terminated.

12. There was no responsibility on the part of the Defendants for damages to Plaintiff, if any, inasmuch as Plaintiff had the obligation to learn the scope of the agency, the power of the Boards of Directors and the Plaintiff was promptly notified as to the validity of the contract.

13. In the computation of the damages by the Court, the percentage, in addition to the guaranteed salary, was improperly figured, inasmuch as the contract, if valid, provided a percentage on the net income and not on the net margin.

14. The allowance of \$500.00 for moving expenses was improperly allowed, inasmuch as there was no valid contract and the other damages allowed covered such item.

15. The Boards' authorization for the two officers to employ a manager is impliedly by law the authorization to employ in accordance with and not in violation of the articles and bylaws, the statutes of the state, common law and public policy.

16. The Boards of Directors could not have ratified the act of the President, inasmuch as the Boards did not know all of the essential facts.

17. There could have been no ratification of the contract since the Boards cannot ratify an illegal act and the owners of the corporations cannot be bound or damaged by the Boards' ratification of their illegal act, if there was a ratification.

18. The Plaintiff cannot claim ratification inasmuch as he did not use diligence in ascertaining the authority of the Boards and of their agents, inasmuch as he had actual knowledge of the limitations of the agents.

19. The contract was invalid as opposed to the statute of frauds as the contract was not signed by

all parties charged therewith or by some person lawfully authorized to do so, since Smith was not authorized by the Boards to act alone and the authorization, if any, did not allow for the hiring beyond the Boards' term and did not authorize the hiring of someone beyond the Boards' pleasure and did not authorize the hiring of a manager with the powers to hire and fire all employees, and the Boards could not authorize an amendment of the bylaws because of statutory law, common law and public policy.

SCOVILLE & LINTON,

By /s/ WALTER LINTON,

Attorneys for Appellants, United Producers and Consumers Co-operative and Southwest Co-operative Wholesale.

Receipt of copy acknowledged.

[Endorsed]: Filed June 18, 1954.

[Title of Court of Appeals and Cause.]

STIPULATION ALLOWING EXHIBITS TO
BE CONSIDERED IN THEIR ORIGINAL
FORM

Come Now the Appellants by and through their attorneys and the Appellee by and through his attorneys, and stipulate and agree that all exhibits designated in the designation of the portion of the record to be printed on appeal may be considered by the Court in their original form without the necessity of reproduction in the printed record.

SCOVILLE & LINTON,

By /s/ WALTER LINTON,

Attorneys for Appellants.

JENNINGS, STROUSS,

SALMON & TRASK,

By /s/ OZELL TRASK,

Attorneys for Appellee.

[Endorsed]: Filed June 30, 1954.